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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, DECEASED, H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1943.

CERTIORARI GRANTED JUNE 21, 1943.

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1 DOCKET No. 100026

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED. AMENDED TITLE—See order 9/25/39—ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: John W. Drye, Jr., Harold A. Donegan, Arthur W. Siegrist. For Comm'r: W. Frank Gibbs.

Docket Entries

1939

Sept 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 16—Copy of petition served on General Counsel.

Sept. 15—Request for Circuit hearing in New York City filed by taxpayer. 9/16/39 copy served.

Sept. 20—Amendment to petition filed by taxpayer. (90-day letter.) 9/20/39 copy served.

Sept. 23—Motion to amend the caption, filed by taxpayer.

Sept. 25—Order amending caption to read, Estate of Henry H. Rogers, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, entered.

Nov. 6—Answer filed by General Counsel.

Nov. 9—Copy of answer served on taxpayer. New York.

1941

March 5—Hearing set April 21, 1941, in New York City.

April 24—Hearing had before Mr. Hill on motion of respondent cont. May 12, New York, granted. Continued New York calendar of May 12, 1941.

April 24—Order of continuance to May 12, 1941, New York City, entered.

April 30—Hearing set June 23, 1941, New York, New York.

May 1—Hearing set May 12, 1941, New York, New York, revised notice.

May 15—Hearing had before Mr. Disney on motion of parties to continue. Granted, and continued to New York, June 2, 1941.

2 May 15—Order of continuance to the New York City calendar of June 2, 1941, entered.
May 17—Hearing set June 2, 1941, New York City.
May 19—Transcript of hearing 5/15/41 filed.
June 5—Hearing had before Mr. Murdock on merits. Submitted. Stipulation of facts filed. Petitioner's brief due in 30 days. Respondent's 30 days thereafter. 15 days to reply.
June 10—Transcript of hearing 6/5/41 filed.
July 3—Brief filed by taxpayer. 7/3/41 copy served on General Counsel.
Aug. 1—Motion for extension of time to Sept. 4, 1941, to file brief filed by General Counsel.
Aug. 30—Reply brief lodged by General Counsel. 9/4/41 granted.
Sept. 19—Reply brief filed by taxpayer. 9/19/41 copy served.
Dec. 20—Memorandum opinion rendered. Murdock. Decision will be entered under Rule 50. 12/22/41 copy served.

1942

Feb. 27—Computation of deficiency filed by taxpayer.
Mar. 4—Hearing set March 18, 1942, on settlement.
Mar. 4—Computation of deficiency filed by General Counsel. 3/5/42 copy served.
Mar. 4—Copy of computation and notice of hearing served on General Counsel.
Mar. 18—Hearing had before Mr. Murdock on settlement under Rule 50. Argued. Taken under advisement. Petitioner's brief filed at hearing and copy served. Respondent's none due.
May 5—Transcript of hearing 3/18/42 filed.
May 12—Decision entered. Murdock, Div. 3. (Memorandum to accompany decision.)
Aug. 4—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
Aug. 12—Proof of service filed by General Counsel. (2).
Aug. 14—Proof of service filed by General Counsel.
Sept. 23—Motion for extension of time to Dec. 2, 1942, to complete and transmit the record filed by General Counsel.
Sept. 23—Order enlarging time to Dec. 2, 1942, to prepare and deliver the record entered.
Nov. 17—Agreed praecipe for record filed by General Counsel, with proof of service thereon.

3

United States Board of Tax Appeals

Docket No. 100026

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals. Sept. 15, 1939.

Petition

The above-named petitioners hereby petition for a redetermination of the alleged deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (MT-ET-8941), dated June 29, 1939, and as the basis of this proceeding allege as follows:

1. The petitioners are the duly qualified and acting Executors of the Last Will and Testament of Henry H. Rogers, deceased, who died on July 25, 1935, a resident of Southampton, Suffolk County, New York, Letters Testamentary having been duly granted to them by the Surrogate's Court of said County on October 28, 1935. Said Letters are still in full force and effect. The petitioner, Adrian H. Larkin, resides at Southampton, New York, and the petitioner, Albert Stickney, resides at 8 East 93rd Street, New York City, New York. The pe-

4 titioner, Central Hanover Bank and Trust Company, is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business at 70 Broadway, New York City, New York. The Federal Estate Tax return for the estate of said decedent was filed with the Collector for the 1st District of New York on July 24, 1936.

2. Upon information and belief, the Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioners on June 29, 1939.

3. The tax in controversy is the Federal estate tax with respect to the estate of said decedent and amounts to $1,754,922.83. The deficiency in estate tax asserted amounts to $849,524.19, all of which is in controversy and petitioners claim that they are entitled to a refund of $1,505,398.64, which amount was paid by petitioners within three years before the filing by them of a claim for refund.

4. Upon information and belief, the determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in determining that the value of 890 shares of the capital stock of 1005 Grand Avenue Corporation should be increased from $89,001.-83, as reported by the petitioners in said return, to $147,393.78.

(b) The Commissioner of Internal Revenue erred in failing to allow as a deduction from the value of the property comprising the trust created under the Will of decedent's
5 father, Henry H. Rogers, Sr., deceased, for the benefit of Henry H. Rogers and over which he had and exercised a power of appointment, the sum of $35,000, representing additional attorneys' fees which will be paid in connection with an accounting proceeding with respect to said trust.

(c) The Commissioner of Internal Revenue erred in failing to deduct from the value of the property comprising the trust created under the Will of decedent's father, Henry H. Rogers, Sr., deceased, for the benefit of decedent and over which he had and exercised a power of appointment, the value of the life estates in said property of Pauline V. Hoving, decedent's widow, and Millicent R. Balcom, decedent's daughter and the value of that portion of said property which passed to them outright.

(d) The Commissioner of Internal Revenue erred in allowing as deductions for Executors' commissions and attorneys' fees only the amounts paid therefor at the date of his determination, instead of the total amounts which have been and will be paid.

(e) The Commissioner of Internal Revenue erred in failing to allow as a deduction the indebtedness of decedent to Bankers Trust Company in the amount of $21,875, arising from a certain agreement of guaranty executed by decedent on July 30, 1928.

(f) The Commissioner of Internal Revenue erred in allowing as credit for state estate, inheritance, legacy or succession taxes paid only the amount of such taxes paid at the date of his determination, instead of the total amount which has been and will be paid.

(g) The Commisioner of Internal Revenue erred in failing to find that petitioners are entitled to a refund of estate tax of $1,505,398.64.

6 5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The fair market value at the date of death of said decedent of the 890 shares of the capital stock of 1,005 Grand Avenue Corporation referred to in paragraph 4. subparagraph

(a) of this petition was not in excess of the value reported in the Federal Estate Tax return, viz, $89,001.83. The value erroneously placed on said stock by the Commissioner of Internal Revenue is $147,393.78. Accordingly, said stock has been overvalued in the amount of $58,391.95.

(b) The Commissioner of Internal Revenue has allowed as a deduction for attorneys' fees from the value of the property comprising the trust created under the Will of decedent's father, Henry H. Rogers, Sr., deceased, for the benefit of decedent and over which he had and exercised a power of appointment, the sum of $107,500, which he determined had been paid. In due course, an additional sum of $35,000 will be paid to Messrs. Davis, Polk, Wardwell, Gardiner & Reed, for attorneys' fees in connection with an accounting proceeding with respect to said trust. Accordingly, the total deduction for attorneys' fees with respect to said trust should be $142,500.

(c) Henry H. Rogers, Sr., the father of decedent, died on May 19, 1909, leaving a Last Will and Testament which was duly admitted to probate in the Surrogates' Court of New York County on May 28, 1909. Article Eighth of said Will of Henry H. Rogers, Sr., deceased, provided in part as follows:

7 "EIGHTH

"All the Rest, Residue, and Remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise and bequeath to my Trustees, hereinafter named, IN TRUST, however, for the uses and purposes following:

"I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descendants of deceased children, one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe and Henry Huttleston Rogers, Jr."

* * * * * *

"IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child, during his or

her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York."

Decedent, who had attained the age of forty years on December 28, 1919, exercised by Articles Twelfth and Sixteenth of his will the power of appointment given to him by the said Will of his father. By decree of the Surrogates' Court of the County of New York, dated January 12, 1939, it was determined that as to 6.667% of the trust created for the benefit of decedent by the said will of his father, the appointment in further trust under Article Twelfth of the Will of decedent was invalid, but that said 6.667% of said trust had been validly appointed by

8 Article Sixteenth of said Will outright in equal shares to decedent's widow, Pauline V. Hoving, his daughter, Millicent R. Balcom, and his grandson, Peter Salm. It was further determined by said decree that the appointment in further trust of one-third of the balance of said trust for the life of said Pauline V. Hoving and the appointment in further trust of an additional one-third of the balance of said trust for the life of said Millicent R. Balcom were valid. The interests which said widow and daughter of decedent took under the exercise by decedent of the power of appointment given to him by the Will of his father were less in amount than they would have taken as heirs at law of decedent under the Will of the donor of the power in the event the power had not been exercised.

Based upon the value of the property comprising said trust determined by the Commissioner of Internal Revenue in his said Notice of Deficiency, and after making adjustment for the additional deduction referred to in subdivision (b) of this paragraph, the amount thereof passing outright to each of said Pauline V. Hoving and Millicent R. Balcom under the appointment contained in Article Sixteenth of the Will of Henry H. Rogers is $187,427.91 and the values of their respective life interests in the trusts created under the appointment contained in Article Twelfth of said Will are as follows:

Pauline V. Hoving (born September 29, 1890)	$1,481,089.57
Millicent R. Balcom (born February 1, 1902)	1,732,956.80

Accordingly, the sum of $3,588,912.29, representing the aggregate value of the life estates of Pauling V. Hoving and Millicent R. Balcom and of the amount passing outright to

9 them, should be deducted from the value of the property comprising the trust created for decedent's benefit under the Will of his father and the value of such property to be included in the gross estate should be $4,841,128.45.

(d) The Commissioner of Internal Revenue has allowed as the deduction for attorneys' fees the sum of $310,000 and as the deduction for Executors' commissions the sum of $1,083,097.77, which amounts he determined had been paid. Upon information and belief, the total amount which will be paid by petitioners for attorneys' fees will be at least $25,000 more than the amount allowed by the Commissioner of Internal Revenue and the total amount which will be paid to petitioners for their commissions, pursuant to decrees of the Surrogate's Court of the County of Suffolk, will be at least $60,000 more than the amount allowed by the Commissioner of Internal Revenue. Accordingly, the amounts to be allowed as deductions for Executors' commissions and attorneys' fees are $1,143,097.77 and $335,000.00, respectively.

(e) On July 30, 1928, Bankers Trust Company having agreed to lend to 87th Street and East End Avenue Corporation the sum of $400,000 provided among other things that said corporation secured the guaranty of said loan by guarantors satisfactory to Bankers Trust Company, decedent executed and delivered a certain agreement of guaranty whereby he guaranteed to Bankers Trust Company payment of 6¼% of the principal and interest of any and all notes delivered to it by 87th Street and East End Avenue Corporation not in excess of said sum of $400,000. In consideration of decedent's guar-

10 anty, and similar guaranties of others, Bankers Trust Company loaned to 87th Street and East End Avenue Corporation the following amounts on the dates stated:

May 17, 1929	$150,000
June 6, 1929	200,000
July 10, 1929	50,000

and received promissory notes of said corporation in said amounts. On information and belief, the loan made as aforesaid on May 17, 1929, was reduced by a payment of $30,000 on November 16, 1934, and by a payment of $20,000 on September 30, 1936, and the date of payment of each of said notes was extended to October 1, 1938, pursuant to said agreement of guaranty. Upon information and belief, said notes were presented on October 3, 1938, to Doctors Hospital, Inc. (successor to said 87th Street and East End Avenue Corporation), for payment, which was duly demanded and refused, and notice of protest was sent to petitioners and the other guarantors. On October 18, 1938, petitioners made payment to Bankers Trust Com-

pany of the sum of $21,875 in full settlement of the obligation of the estate of said decedent under said agreement of guaranty, dated July 30, 1928. Petitioners are unable to collect any part of said payment made to Bankers Trust Company from Doctors Hospital, Inc., or 87th Street and East End Avenue Corporation. Accordingly, the amount of such payment should be allowed as a deduction.

(f) The Commissioner of Internal Revenue has allowed as credit for state estate, inheritance, legacy or succession taxes with respect to this estate the sum of $3,027,845.96. Such taxes will be paid in an amount equal to or in excess of 80% of the estate tax finally determined to be payable under the Revenue Act of 1926 and will be paid within the period required by law.

11 (g) Petitioners have made the following payments on account of the Federal estate tax with respect to the estate of said decedent:

May 18, 1936	$1,000,000.00
July 24, 1936	7,191,967.00
September 14, 1937	600,000.00

On July 24, 1939, a claim for refund of the sum of $1,505,398.64 was filed in the office of the Collector of Internal Revenue for the First District of New York.

Wherefore, the petitioners pray that this Board may hear this proceeding and determine that (1) the deficiency alleged in said Notice of Deficiency does not exist and (2) there has been an overpayment of Federal estate tax by petitioners in the amount of $1,505,398.64, which amount was paid by petitioners within three years before the filing of a claim for refund thereof.

JOHN W. DRYE, JR.,
John W. Drye, Jr.,
70 Broadway, New York City,
HAROLD A. DONEGAN,
Harold A. Donegan,
70 Broadway, New York City,
ARTHUR W. SIEGRIST,
Arthur W. Siegrist,
70 Broadway, New York City,
Counsel for Petitioners.

12 STATE OF NEW YORK,
County of New York, ss:

Adrian H. Larkin, being duly sworn deposes and says: That he is one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and is one of the peti-

tioners above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ADRIAN H. LARKIN.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

STATE OF NEW YORK,
County of New York, ss:

Albert Stickney, being duly sworn, deposes and says: That he is one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and is one of the petitioners above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

ALBERT STICKNEY.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

13 STATE OF NEW YORK,
County of New York, ss:

C. L. Herterich, being duly sworn, deposes and says: That he is an officer, to wit: an Assistant Vice-President of Central

Hanover Bank and Trust Company, one of the duly qualified and acting Executors of the Estate of Henry H. Rogers, deceased, and one of the petitioners above named; that he is duly authorized by said Central Hanover Bank and Trust Company to verify the foregoing petition; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein; and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

C. L. HERTERICH.

Sworn to before me this 13th day of September 1939.

[SEAL] EDWARD K. BACHMAN,
Edward K. Bachman,

Notary Public, New York County; N. Y. Co. Clk's No. 4, Reg. No. 0B185; Certificates filed in Bronx, Kings, Nassau, Queens, Suffolk and Westchester Counties; Bronx Co. Clk's No. 79, Reg. No. 206B40; Kings Co. Clk's No. 229, Reg. No. 331; Nassau Co. Clk's No. 42B40; Queens Co. Clk's No. 776, Reg. No. 3127.

Commission expires March 30, 1940.

14 EXHIBIT A

Amendment to Petition

Office of Internal Revenue Agent in Charge, Brooklyn Division. Estate of Henry H. Rogers.

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
June 29, 1939.

CENTRAL HANOVER BANK & TRUST CO., ET AL., *Executors,*
70 Broadway, New York, New York.

GENTLEMEN: You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $849,524.19, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Daniel A. Bolich, Internal Revenue Agent in Charge, for the attention of Estate Tax Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By DANIEL A. BOLICH,
Daniel A. Bolich,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form or waiver.
MR/SG

15 MT-ET-8941-1st New York. Estate of Henry H. Rogers. Date of death—July 25, 1935.

STATEMENT

In the final determination of the estate's tax liability as herein reached, careful consideration has been given to the protest filed against the deficiency tax as disclosed in the preliminary letter to the executors dated May 4, 1938.

The matters placed in issue by the protest will hereinafter be specifically commented upon.

Changes as disclosed by the preliminary letter, against which no protest was filed, are herein adopted and made final, and will be fully reflected in the tax summary to be hereinafter set forth.

The protest relates to the following items:

GROSS ESTATE

Real estate	Returned	Tentatively determined	Determined
Item 1—Premises at Southampton, N. Y., known as "Port of Missing Men"	450,000.00	650,000.00	450,000.00

Based upon the record as now constituted it is felt that the amount as originally returned was a substantially correct valuation for this property as of date of death, and adjustment is made accordingly.

Stocks and Bonds			
Item 27—371 Shares Seaboard Sand & Gravel Corp., 8% Pfd. stock	0	37,100.00	18,550.00
Item 35—500 shares Standard Trap Rock Corp. Pfd	25,000.00	30,000.00	30,000.00
Item 37—890 shares 1005 Grand Ave. Corp	89,001.83	147,393.78	147,393.78
Item 38—100 shares Tuxedo Securities Corp	700.00	1,000.00	1,000.00
Item 46—94 shares Wyoming Land Co	7,050.00	24,440.00	15,745.00

Item 27 was deemed to be fairly worth $50 per share after a careful consideration of its balance sheet and operating statements.

Item 35 was fully gone into in connection with an award which this corporation has in its favor, and it was felt that the heretofore determined valuation of $60 per share for this stock was fair.

16 Item 37 was valued on the basis of one-half of a net worth figure of $294,787.57 reported in a balance sheet considered by an internal revenue agent of the St. Louis Missouri division. In arriving at the latter net worth figure the Missouri agent adopted a valuation of $298,950 for the land and building owned by the corporation, located at Kansas City, Mo. The evidence bearing on this item submitted with the protest was referred to the Missouri agent for his further attention, and the latter has renewed his recommendation of $298,950 for the corporation's Kansas City, Mo., realty holdings. No change in this item is accordingly deemed to be warranted.

Item 38 was deemed to be fairly worth $10 per share as explained at the conferences on the protest.

Item 46 is determined herein at $167.50 per share in conformity with the agreement reached with respect to this particular stock.

Mortgages, Notes, and Cash			
Items 11, 12, 13: London Accounts	2,439,658.46	2,834,159.06	2,834,479.06

The amount which the estate sought here to claim represents British death duties in connection with London cash accounts, but which duties are not properly deductible for Federal estate tax purposes. The protest in this particular connection is accordingly rejected. Showing was, however, made that the estate was entitled to a deduction of $363.54 representing British income taxes on income accrued prior to the date of decedent's death, and due credit will hereinafter be given for the item of $363.54, under Debts of Decedent.

Item 34: Accrued income	88,484.89	88,484.89	86,174.29

On consideration of the protest it developed that there had been inadvertently included in this fund, as accrued dividends, certain sums which were not taxable as dividends as of date of death, as follows: Bristol Myers Co., $122.40; Brooklyn Union Gas Co., $2,025; Life Savers Corp., $40.80; and Vick Chemical, Inc., $122.40; total $2,310.60. Adjustment is made accordingly.

Item 67:			
Notes of Francesco and Laura Rospigliosi (Principal)	0	21,000.00	0
Accrued interest Item 67	0	10,275.41	0

On the basis of the record as now constituted the estate's claim that these notes possessed no value as of date of death is sustained, and the principal of the notes, together with the previously determined accrued interest thereon, is now eliminated as a part of the decedent's gross estate:

17 Insurance			
Item 1: United States Government Life Insurance Policy #514,387	0	10,175.60	10,175.60

This policy was payable to the decedent's estate as the beneficiary thereof, and it constituted taxable insurance within the meaning of the Federal estate tax law and regulations. No charge is accordingly made in this item.

Other Miscellaneous Property			
New Item: Amount due under will of decedent's father	0	0	17,914.74

On consideration of the estate's protest it developed that the trust fund over which decedent had a general power of appointment, and which is returned as Item 1 of Schedule F, included the sum of $17,914.74 which had vested in the decedent outright at the age of 40. The latter sum is accordingly being withdrawn from Item 1 of Schedule F, and is herein being treated as being subject to inclusion under Schedule D-2 of the return.

Decedent's reversionary interest in trust fund under trust instrument dated December 31, 1928 (Noted in return as Item 8, Schedule E)	0	163,954.04	0
Decedent's reversionary interest in trust fund under trust instrument dated January 8, 1931 (Noted in return as Item 10, Schedule E)	0	27,832.84	0
Decedent's reversionary interest in trust fund under trust instrument dated August 24, 1933 (Noted in return as Item 11, Schedule E)	0	56,618.09	0

Upon further consideration it is now held that the decedent possessed no interest in the above referred to trust instruments subject to being included as a part of his gross estate for Federal estate tax purposes, and the previously determined amounts for these items are accordingly being withdrawn.

18	Powers of Appointment			
	Item 1; Under will of decedent's father, Henry H. Rogers, Sr., who died May 19, 1909	7,000,000.00	9,094,037.16	8,465,040.74

After a full consideration of the record as now constituted it is held that the trust fund here involved, over which decedent had, and exercised, a general power of appointment, is properly subject to being included as a part of the decedent's gross estate, under Section 302 (f) of the Revenue Act of 1926, and no change is accordingly being made from the determination heretofore reached with respect to this item, except as regards questions of valuation, as follows:

Gross value of Item 1, Schedule F, per preliminary letter of May 4, 1938			9,201,537.16
	Tentatively Determined	Determined on Protest	
94½ shares Wyoming Land Co.	24,570.00	15,828.75	
Federal, Municipal and other bonds	2,067,439.01	2,058,234.13	
Cash to which decedent was entitled outright, and transferred to "Other miscellaneous property" Sched. D-2	17,914.74	0	
	2,109,923.75	2,074,062.88	
Difference (minus)			35,860.87
Gross value Item 1, Sched. F as redetermined			9,165,676.29
Deductions:			
Attorneys' Fees per preliminary letter 5/4/38 (no change)	107,500.00		
Trustees' Commissions as now determined	520,708.48		
Guardians' Allowances as now determined	72,427.07		
Total deductions			700,635.55
Net value Item 1, Sched. F as redetermined			8,465,040.74

19 The Wyoming Land Company stock is adjusted at $167.50 per share in accordance with the agreement reached on these holdings in the conferences on the estate's protest.

As to the bond items, it is now felt that these securities were substantially correct as originally valued by the estate, in the aggregate amount of $2,067,439.01, and adjustment is herein made accordingly.

The protest also raised a question as to the values for stock items described as 204 shares Bristol Myers Co.; 1,620 shares Brooklyn Union Gas Co.; 102 shares Life Savers Corp.; and 204 shares Vick Chemical, Inc. The tentatively determined values were on the basis of the mean between the high and low

sales on the New York Stock Exchange, and no change is warranted with respect to these items under the instant heading. The estate was, however, entitled to relief with respect to certain dividends erroneously returned in connection with these particular shares of stock, due allowance for which, however, has hereinbefore been given, in connection with accrued income item #34, of Schedule C of the return.

With respect to the cash item of $17,914.74 noted in the above tabulation, this is now being eliminated from the instant schedule since it properly belongs under "Other Miscellaneous Property," and under which heading it has hereinbefore been included.

The Attorneys' Fees chargeable against this trust fund as heretofore determined were not in issue on the protest. However, as regards the Trustees' Commissions and Guardians' Allowances, for which no deduction was provided in the preliminary letter, the evidence now of record is to the effect that the trustees actually received payments on February 20, 1939, aggregating $355,420.54, and that they will, with reasonable certainty, receive further payments aggregating $165,287.94, making a total in that connection of $520,708.48; also, that on February 20, 1939, there was a payment of $37,427.07 as a Special Guardians' Fee, and one of $35,000 as a General Guardian's Fee. Adjustments are herein made accordingly.

DEDUCTIONS

Funeral Expense (New Item)			0	0	300.00

To allow for a charge of $300 incurred and paid for an autopsy.

Executors' Commissions	976,960.35	938,895.95	1,083,097.77	

The determined amount is the aggregate of the commissions as adjudicated in connection with executors' accountings, and as actually paid, to date.

20 Attorneys' Fees	400,000.00	250,000.00	310,000.00	

The determined amount is the total of the attorneys' fees as paid to date.

Miscellaneous Administration Expenses: Additional items			0	0	33,066.66

The evidence now of record indicates that the estate is entitled to a deduction of $674.39 for attorneys' disbursements paid October 1, 1937; $156.34 for further attorneys' disbursements paid October 28, 1938; $27,735.93 for praperty maintenance expenses for the period from September 1, 1937, to August 1, 1938, and $4,500 for Special Referee and Guardian's

allowances paid January 4, 1939, making a total of $33,066.66 as the additional amount deductible under this hearing.

Debts of Decedent:			
Item 258	45,753.04	0	44,850.98
Additional Claims:			
a—Income tax on foreign accounts	0	0	363.54
b—Deficiency Federal Income Tax—1934	0	0	49,888.79
c—Federal Gift Tax—1934	0	0	28,584.10
d—Federal Gift Tax—1935	0	0	339.08
e—New York Income Tax Deficiency—1934	0	0	5,379.13
f—Mercer—services	0	0	765.68
g—Wako lease	0	0	1,575.03
h—Dr. Berglund	0	0	2,323.00
i—Dr. Cole	0	0	2,000.00
j—Holland & White, Inc	0	0	76,500.00
k—Murray & Fregurtha	0	0	18.65
l—Dr. Stetson	0	0	6,500.00
m—Marie Zimmerman	0	0	950.00
n—Frederick Yardley	0	0	193.00
o—David Bookstaver	0	0	50.00
p—Andrew Kennely, Inc	0	0	125.00
q—Emslie & McWilliams	0	0	456.00
r—P. L. Behrendt	0	0	1,000.00
s—Rent Southampton	0	7,800.00	13,648.05
t—Anne Watson	0	0	22,930.12
u—Suffolk County Council	0	0	2,000.00
v—Deficiency Federal Income Tax—1935	0	0	49,076.37
w—Loan guaranty	0	0	0

Except for those claims designated (s), (t), and (w) the debts of decedent as above tabulated are now allowed in the sums in which these items have been definitely determined and paid by the executors, according to the evidence now of record. For further reference to Item (a) see explanation in connection with Items 11, 12, and 13 under "Mortgages, Notes and Cash."

21 The determined amount for Item (s), which is a liability under a building lease, is predicated upon an annual rent liability of $3,600 per annum, less a sub-rental of $360 per annum net loss $3,240, for a period of 5 years, discounted at 6%.

Item (t), which is a claim against the decedent's estate, by one Anne Watson of $4,000 for her life, is now deemed to constitute a deductible claim for Federal estate tax purposes, and is herein allowed on the basis of a factor of 5.74003, the claimant having been born on May 4, 1863, and was around the age of 72 at the time of decedent's death.

Item (w), which is a claim for $21,875 in connection with a loan by the Bankers Trust Company to the 87th Street and East End Avenue Corporation, which the decedent guaranteed, is disallowed inasmuch as it was not felt that this indebtedness

had been incurred or contracted bona fide and for an adequate and full consideration in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926, as Amended.

In view of the foregoing the Federal estate tax liability of this estate is finally determined as follows:

	Determined in P/L	Determined on Protest	
Gross estate per preliminary letter May 4, 1938			27,158,970.04
Schedule A, Item 3	650,000.00	450,000.00	
Schedule B, Item 27	37,100.00	18,550.00	
Schedule B, Item 46	24,440.00	15,745.00	
Seshedule C, Item 34	88,484.89	86,174.29	
Schedule C, Item 67	21,000.00	0	
Schedule C, Item 67 (Int.)	10,275.41	0	
Schedule D–2, New Item	0	17,914.74	
Schedule D–2, Revisionary interests originally referred to in the return as:			
Item 8, Schedule E	163,954.04	0	
Item 10, Schedule E	27,832.84	0	
Item 11, Schedule E	56,618.09	0	
Schedule F, Item 1	9,094,037.16	8,465,040.74	
	10,173,742.43	9,053,424.77	
Difference (minus)			1,120,317.66
Gross estate as herein determined			26,038,652.38
22 Total deductions 1926 Act per preliminary letter			2,794,775.31
Funeral Expenses (New Item)	0	300.00	
Executors' Commissions	938,895.95	1,083,097.77	
Attorneys' Fees	250,000.00	310,000.00	
Misc. Admi. Exp. (New Items)	0	33,066.66	
Debts of Decedent—Item 258	0	44,850.98	
Debts previously in dispute, and herein discussed as claims (a) to (w), inci	7,809.00	264,695.54	
	1,196,695.95	1,736,010.95	
Difference (plus)			539,315.00
Total deductions 1926 Act as herein determined			3,334,090.31
Gross estate as determined			26,038,652.38
Total deductions 1926 Act as determined			3,334,090.31
Net estate 1926 Act as determined			22,704,562.07
Net estate 1932 Act as determined			22,754,562.07
Gross tax 1926 Act as determined			3,894,412.41
Credit for estate or inheritance tax			3,027,845.96
Net tax 1926 Act			866,566.45
Total gross taxes 1926–1932 Acts		12,069,337.24	
Gross tax 1926 Act		3,894,412.41	

Gross additional tax	8,174,924.83
Net additional tax	9,041,491.28
Amount shown upon return as tax	8,191,967.09
Deficiency tax as determined	849,524.19

The deficiency bears interest at the rate of six percent per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

It will be noted that credit of $3,027,845.96 has been allowed against the tax under the 1926 Act, an account of State estate or inheritance tax disclosed to be due upon this estate. A further credit of $87,683.97 will be allowable herein, provided that there is furnished the evidence required in that connection under Article 9 of Estate Tax Regulations 80. If this further credit is allowed the net deficiency tax will be $761,840.22.

32 If a waiver therefor, together with the above referred to additional credit proof, is furnished within ninety days from the date of this letter, $761,840.22 of the deficiency will be assessed. Otherwise, if upon the expiration of ninety days from the date of this letter if a petition has not been filed with the Board of Tax Appeals, the full deficiency of $849,524.19, as herein determined, will be assessed.

24 United States Board of Tax Appeals

Docket No. 106026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Received November 6, 1939. U. S. Board of Tax Appeals.

Answer

Now comes the respondent by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled case, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2.

3. Admits that the taxes in controversy are Federal estate taxes of Henry H. Rogers, deceased, and that the amount of the deficiency proposed by the respondent is $849,524.19, but denies the remaining allegations of paragraph 3.

4. Denies the respondent's determination of decedent's estate tax liability is based upon the errors alleged and set forth in subparagraphs (a) to (g), inclusive, of paragraph 4.

5 (a). Admits that respondent has valued 890 shares of capital stock of 1005 Grand Avenue Corporation at date of decedent's death on July 25, 1935, at $147,393.78, but denies the remaining allegations of paragraph 5 (a).

25 5 (b). Admits that respondent has allowed as a deduction for attorneys' fees from the value of the property, comprising the trust created under the will of decedent's father over which decedent exercised a power of appointment, the sum of $107,500.00, but denies the remaining allegations of paragraph 5 (b).

5 (c). Admits that decedent's father, Henry H. Rogers, Sr., died on May 19, 1909, leaving a last will and testament which was duly admitted to probate in the Surrogates' Court of New York County on May 28, 1909; admits that Article 8th of said will provides in part as alleged and set forth in paragraph 5 (c) of the petition; admits that decedent attained the age of forty years on December 28, 1919, and that he exercised the power of appointment given to him by the will of his father, but denies the remaining allegations of paragraph 5 (c).

5 (d). Admits that the respondent has allowed as deduction for attorneys' fees the sum of $310,000.00 and for executors' commissions the sum of $1,083,097.77, but denies the remaining allegations of paragraph 5 (d).

5 (e). Denies the allegations contained in paragraph 5 (e).

5 (f). Admits that respondent has allowed as credit for State estate, inheritance, legacy, or succession taxes with respect to decedent's estate the sum of $3,027,845.96, and respondent accepts the assuring statements contained in paragraph 5 (f) that "such taxes will be paid in an amount to or in ex-

26 cess of 80% of the estate finally determined, etc.," and respondent will and stands ready to allow decedent's estate the full amount of said credit allowed by law upon submission of proof that the amount finally determined to be due has been paid.

5 (g). Admits that this estate paid estate taxes in the amount of $1,000,000.00 on May 19, 1936 the sum of $7,191,967.09 on July 24, 1936, and deposited an additional $600,000.00 with the Collector of Internal Revenue, First New York District, on

September 16, 1937; and admits that on July 24, 1939, a claim for refund of $1,505,398.64 in Federal estate taxes was filed on behalf of this estate with the Collector of Internal Revenue for the First District of New York.

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

J. P. WENCHEL,
E. C. A.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of counsel:
E. O. HANSON,
Division Counsel.
W. FRANK GIBBS,
Special Attorney,
Bureau of Internal Revenue.
jh 10-31-39

27 Official Report of Proceedings Before the U. S. Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals, June 10, 1941.

Hearing at New York, N. Y.
Date June 5, 1941.

28 Before the United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UNITED STATES CUSTOMS COURT,
201 VARICK STREET,
New York, N. Y., June 5, 1941.

(Met pursuant to notice.)

Before Hon. J. EDGAR MURDOCK, Member.

Appearances: Arthur W. Siegrist, Esq., 70 Broadway, New York, N. Y., appearing for the Estate of Henry H. Rogers, the Petitioner. W. Frank Gibbs, Esq., 90 Church Street, New York, N. Y., appearing for the Commissioner of Internal Revenue, the Respondent:

29 *Proceedings*

The CLERK. Docket No. 100026, Estate of Henry H. Rogers.

Mr. GIBBS. If your Honor please, Mr. Siegrist who appears here this morning on behalf of the Petitioner has asked me to make a statement as regards the case as we have only one issue to present to your Honor, all the others having been settled. This case involves an estate tax liability of Henry H. Rogers who died July 25, 1935.

The Commissioner, on June 29, 1939, mailed a deficiency notice to the executors of his estate proposing a deficiency of $849,524.19. In the deficiency notice the Commissioner made a finding that the amount of the net estate under the Revenue Act of 1926 was $22,704,562.07 and the amount of the net estate under the Revenue Act of 1932 was $22,754,572.07.

Included in the aforesaid determination the Commissioner included as a part of the net taxable estate an item representing property passing under the general power of appointment which decedent exercised in his last will, the power of appointment having been given to him by his father who died in 1909.

In filing the estate tax return these Petitioners as executors of the estate included the property passing under
30 power at a value of $7,000,000. In the deficiency letter the Respondent determined the value of the property dated at decedent's death to be $8,465,040.74.

The larger part of the proposed deficiency in this case is due to the Commissioner's increased valuation on this property passing under power.

In the petition filed with the Board there have been many assignment of errors raised with respect not only to the issue involved with regard to the value of the property passing under power but many other issues.

In trying to get this case ready to present to the Board, counsel have labored trying to settle all issues except this

one involving property passing under power and we have done so.

In the consideration of these matters certain affirmative issues which the Respondent contemplated raising before the Board were discussed and considered and we have also reached a settlement on all of those issues although we have not pleaded by way of amending the answer and raised any of these affirmative issues.

I would like to read from a certain paragraph of the stipulation which we have entered into.

Paragraph 12 of the stipulation which will be offered reads as follows:

"The net value at the date of decedent's death of the property in trust created under Colonel Rogers, Sr.—"
31 he is the father of this decedent who died in 1909 where he willed for the benefit of the decedent amount of $8,428,949.60.

The value of decedent's net taxable estate exclusive of the value of the property in said trust amounts to $14,592,436.20 under the provisions of the Revenue Act of 1926 and $14,642,436.20 under the provisions of the Revenue Act of 1932 as amended by the Revenue Act of 1934.

It is further agreed that if all of the property in said trust is held to be includable in decedent's net taxable estate, the net taxable estate of the decedent under the Revenue Act of 1926 and Revenue Act of 1932 as amended by the Revenue Act of 1934 amounts to $23,021,385.80 and $23,071,385.80 respectively.

Those agreed figures give effect to a settlement of the parties on all the issues raised in the petition and also such affirmative issues that we considered in the conferences preparatory to getting this case ready for trial.

Paragraph 13 of the stipulation reads:

"It is also agreed by Petitioner and Respondent that the Board enter its decision under Rule 50 in accordance with the facts herein stipulated determining an overpayment or
32 correct deficiency to be assessed regardless of whether the amount of the deficiency is larger than the amount of the deficiency proposed by the Respondent in his deficiency notice of June 29, 1939."

Respondent in presenting this stipulation at the hearing before the Board makes claim for any increased deficiency. In other words, we have settled all issues except this question of what is to be included in the decedent's estate by reason of the exercise of the power and the property passing under the power.

I would like to have your Honor's observation on the procedure here as to whether or not you want us to file an amended answer as we have settled everything except this one issue.

The MEMBER. If you are satisfied, I will be.

Mr. GIBBS. I might say the sole dispute is with regard to the property passing under power. Before the property is included goes in the taxable estate then the net taxable estate is larger than was determined in the deficiency letter and there will be an increased deficiency. However, under the petition of the Petitioner, if certain portions of this property is omitted under the passing of the power, the net taxable estate will be much less than as determined in the deficiency letter and there will be quite a substantial refund.

The MEMBER. I think that will be satisfactory
33 from my standpoint.

Mr. GIBBS. With respect to the question that we are presenting to the Board for decision, the facts briefly are these: Colonel Rogers, this decedent's father, died in 1909 and in his last will created trusts in favor of his four children one of whom was this decedent.

In accordance with the terms of his will he provided that the income from the trusts to each child shall be paid to that child for life and upon the child attaining the age of 40 years, one-half of the corpus in the trust for that particular child would be distributed outright to that particular child. The trust after the child became 40, the balance was still to be paid for life to that child and upon his death there was given the general power of appointment over the property in the trust at that time.

This decedent reached the age of 40 in the year 1919 and at that time one-half of the trust corpus in his trust was distributed and paid over to him. This decedent died July 25, 1935, and in his will he exercised the power.

Colonel Rogers, Sr.'s will provided that if the power was not exercised the property would go to the then heirs of
34 the deceased child in accordance with the laws of the State of New York involving the transfer of real estate.

In exercising the power, Colonel Rogers set up three trusts. One-third of the appointed property was put in trust, the income to be paid to his then widow for life or until she remarried and if she remarried one-half of the corpus of her trust was to be paid to the decedent's daughter Millicent Rogers. Another third was left in trust for the life of Millicent, his daughter, the income to be paid to her for life, and there were certain dispositions made upon the death of the life beneficiary.

The other third was left to a child of Millicent named Peter Salm, the income to be paid to him for life.

After Colonel Rogers died there was litigation occurred over his estate and there was not a final accounting. The trustees under the old man's will—I refer to him respectfully—until 1939, and in 1939 the final accounting of the trustees were made and it is quite involved and we have a copy of that order in exhibit in the stipulation and I will not attempt to go into it now because it is very much involved because of the various holding in respect to the various holdings of the property.

Thus it is the Respondent's position in this case that
35 all of the property passed under the power. It's the position of the Petitioners, if I may state it, that they say that all of the property that went to Peter Salm in the exercise of the power did pass under the power but they say the fact that Mrs. Rogers, the widow, and Millicent, being heirs of the decedent, would have taken a larger estate if the power had not been exercised; that the value of their life estate should be carved out of the larger estate and that did not pass in the power.

There are many decisions recently on this question. I hope to distinguish some of them and we have some arguments in regard too, if the Board follows those decisions. We contend that Millicent in any event by reason of the fact that the widow remarried, got a larger estate under the power than she would have gotten if the power hadn't been exercised.

Mr. SIEGRIST. Your Honor, Mr. Gibbs has stated the point of the case in great detail. I would like to say that the executors of Colonel Rogers' estate have paid $8,800,000 in Federal estate taxes and if the Respondent's contention here prevails there will be a deficiency of approximately $300,000 more. If the Petitioners are successful there will be an overpayment of approximately $1,300,000.

As Mr. Gibbs has stated, our position is that the widow
36 and daughter of Colonel Rogers received from this appointed estate less than they would have received if the power had not been exercised and under two decisions of the Circuit Court of Appeals and three decisions of the Board of Tax Appeals we believe that the property which they received, that is, the widow and the daughter from this appointed fund, is not to be included in the gross estate of the decedent.

Mr. GIBBS. We have an agreed stipulation.

The MEMBER. You may file the stipulation. Do you want to file briefs?

Mr. GIBBS. Yes, sir.

The MEMBER. In accordance with the Board's rules?

Mr. GIBBS. I would like to have the Petitioners file their brief and Mr. Drye said he would like 30 days after, approximately, to file his brief. This is one of the cases I have to brief before I take over my new duties and I would like 30 days.

The MEMBER. Is that satisfactory?

Mr. SIEGRIST. Yes.

The MEMBER. Petitioner will file his brief in 30 days and Respondent 30 days after that and Petitioner 15 days later to reply.

Hearing closed.

37 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Arthur W. Siegrist, Esq., for the petitioner.
W. Frank Gibbs, Esq., for the respondent.

Memorandum Opinion

MURDOCK. The Commissioner determined a deficiency in estate tax in the amount of $849,524.19. A number of issues have been settled by agreement of the parties and incorporated in their stipulation. The facts have been stipulated, and the stipulation in its entirety, together with the exhibits attached thereto, is adopted as the Board's Findings of Fact.

The decedent died in 1935 testate in New York. His father had died in 1909. The will of the father which was probated in New York created a trust for the benefit of the present
38 decedent. The latter was given a power of appointment by will over one-half of the trust property, and if he failed to appoint, that property was to go to his heirs at law, in accordance with the laws of the State of New York relating to inheritance of real property. The son's heirs at law at the time of his death were his widow, his daughter, and his son. He exercised the power of appointment in such a way that, as construed by the New York courts, 6.667 per cent of the trust property went outright in equal shares to his widow, his daughter, and a grandson. The balance of the property was validly appointed one-third in trust for the benefit of the widow, one-

third in trust for the benefit of the daughter, and the remaining one-third outright to the grandson. The grandson's share is concededly within the gross estate. The figures are not in dispute. The value of the property over which the decedent had a power of appointment was at the time of his death $8,428,949.60. The value of the property passing to the widow and the daughter under the power was $3,640,122. The value of the remaining property passing under the power was $4,788,837.60. The $3,640,122 which went to the widow and daughter under the power was less than they would have gotten had there been no exercise of the power. The petitioner contends, therefore, that no property passed to those two under the exercise of the power by the decedent and it was error to include in the value of the gross estate of this decedent the value of the interests which the widow and daughter received. That is the only issue for decision by the Board.

The petitioner argues that the Board and two Appellate Courts have held that property received by an appointee
39 does not pass under the exercise of the power, and the value thereof may not be included in the gross estate of the donee of the power where the appointee received less under the exercise of the power than he would have received under the instrument creating the power in default of any exercise of the power, i. e., in such case the exercise of the power merely cuts down the estate of the appointee and nothing passes to him under the power. The cases relied upon are Estate of Gertrude Bucknell Day, 44 B. T. A. 524; Legg's Estate v. Commissioner, 114 Fed. (2d) 760; Rothensies v. Fidelity-Philadelphia Trust Co., 112 Fed. (2d) 758; James C. Webster, et al., Executors, 38 B. T. A. 273; and Lewis Spencer Morris, et al., Executors, 39 B. T. A. 570. The respondent concedes that if those cases apply, the computation of the petitioner is correct. The respondent first argues that the cases have been incorrectly decided, but we are not disposed to reopen the subject. He next attempts to distinguish the present case, but we think it is not distinguishable. Finally, he suggests that the property should be included in the gross estate of the decedent under section 302 (a), but concedes that Helvering v. Safe Deposit & Trust Co. of Baltimore, 121 Fed. (2d) 307, certiorari granted Oct. 27, 1941, holds to the contrary. The question was not raised by the pleadings. Even if it were, the respondent admits that he has no authority for his position. We hold, following the above cited decisions of the Board and the Courts, that there should be included in the gross estate of the decedent only $4,788,827.60 of the property subject to the power of appointment.

Decision will be entered under
Rule 50.
Enter:
Entered: Dec. 20, 1941.

40 Official Report of Proceedings Before the U. S. Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, ETC. PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

United States Board of Tax Appeals, May 5, 1942.

Hearing at Washington, D. C.
Date March 18, 1942.

41 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, ETC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Reporter's Minutes

Hearing at Hearing Room No. 2, Internal Revenue Building, Washington, D. C., on Wednesday, the 18th day of March, 1942, at 9:30 o'clock a. m.

The above-entitled proceedings came on for hearing on this, the 18th day of March 1942, before the Honorable J. Edgar Murdock, Member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon, the following proceedings were had, to wit:

Appearances: James C. Maddox, appearing on behalf of the Commissioner of Internal Revenue, Respondent. John W. Drye, Jr., for Petitioner.

42 *Proceedings*

Mr. DRYE. Your Honor, we filed a recomputation under Rule 50 of the amount of the overpayment of tax under your decision in this case.

There is no dispute between ourselves and the Government as to the correct tax liability under your decision.

Our computation shows an overpayment of $1,341,102. The petition which respondent has filed show $600,000 less.

I understand they object to your considering as payment $600,000 which was paid to the Collector of Internal Revenue, without assessment of tax, during the course of the audit of the Estate Tax Return.

It seems the Estate Tax Return was filed in 1936 and an audit was made in 1937, during which the Government indicated they were going to impose a large deficiency, which they subsequently did, which gave vise to the case before you.

On September 15, 1937, a $600,000 check was sent to the Collector with a letter stating that payment was made on account of additional estate tax liability under this return. The check was collected and is returnable, and there is no question but what the payment was made. It was stipulation of facts filed at the time the case was submitted.

I am not sure that I understand exactly what the Government's position is. I think they are worried about
43 the question of whether we are entitled to interest. I don't think they dispute the fact that we are entitled to get the money back. I understand that this Board has usually held that it does not determine questions of interest, but is duty under Section 322 (a) is to determine the amount of overpayment of tax.

The stipulation resited that petitioner has made the following payments. I am reading from the stipulation of facts.

"Petitioners have made the following payments on account of Federal Estate Tax with respect to decedent's estate; May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed, and is held in the Collector's office known as 'Unidentified Accounts')."

My concern about the matter is the provision of Section 322 (a) which says:

"Overpayment Found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer.
44 No such credit or refund shall be made of any portion of the tax unless the board determines as part of its decision that such portion was paid (1) within three years

before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency."

I think the Government's position is they would like to give us the money back, but they want to give it back to us without interest, and I am just a little bit afraid, under that language, what we are entitled to get back is what the Board says we paid in excess of what the tax liability is.

Now that question has arisen very directly in Standard Portland Cement Company v. Commissioner, in the Third Circuit. In that case there had been a voluntary payment and there was a question of deficiency, and the Third Circuit says—this is a comparatively recent case in 80 Federal Second.

The MEMBER. I know all about that case. It is my case. I think they were wrong in that case. I think that brings up a different proposition. The Point there that I was concerned about, when it was argued before me, was whether the Board was determining a deficiency as of the time it wrote the order, or whether it was reviewing a determination made by the Commissioner at some prior time, and at that time we did not have the same provisions to rely on that we have now. It was my view that what the parties did after the Commissioner determined the deficiency was none of my concern, and I did determine that the Commissioner had correctly determined the deficiency, and then had allowed the parties to adjust any financial transactions they had since. I had the duty of determining what the correct deficiency was. The Court, however, said I was wrong, and said that in my decision I would have to speak as of the time I wrote it, and at that time there had been a payment.

Now, I think the whole hitch in that case was they had to get interest on the payment or not. That is what they were talking about, and it seemed to me, as you said, that the interest is no concern of mine. I still think that is true. But the payment in that case had been made in a way that did not seem to me to be in agreement with the statutory language. I do not believe that case has much to do with the case now before us. Under the statutory provision, before refund is made, the Board has to consider payments made at a certain time.

Now, I think it is my duty, under the statute, to determine the payment, and as you said, it would seem to me that payment had been made, regardless of how the Collector chose to treat it on his books. I think I would have to say that payment had been made, but if you have about covered your

part of it, let us see what Mr. Maddox says, and so
46 maybe we can get closer to the differences.

Mr. MADDOX. The test, as Mr. Drye has said, narrows down to the question of whether this $6,000,000 payment made on September 15, 1937, was made on account of tax or not. The importance of it in this case is this:

It is true the Board has jurisdiction of overpayments, and it does not have jurisdiction over interest, under its own decisions; but, if the Board finds this to be overpayment, it naturally follows, as a matter of law, that interest will have to be paid. That is the thing that makes it important in this case—whether it should be found as overpayment, on amount of this size, with interest at 6% amounts to considerable money, and it is important.

Now, the situation is this: The decedent died in 1935. The tax, under the Statute as amended, was required to be paid within 15 months of the date of death, as I understand the statute.

If I correctly compute it the tax was due not later than October 15, 1936, in this case, and the record shows that the return filed July 24, 1936, showed a tax liability of $8,191,967.09.

The amount paid on May 18, 1936, was $1,000,000, and in July 24, 1936, that is the date the return was filed, the balance was $7,191,967.09. That is the tax liability as disclosed by the return of this taxpayer, at the time it was due.
47 Now, Mr. Drye says, and this record does not disclose, and I don't know why, at the time the taxpayer walked into the Collector's office; and paid $600,000 in September 15, 1937, when the return was in process of audit and report. However, on that day the Commissioner had made no determination, and had made no preliminary indication as to whether he was going to find a deficiency, or overpayment, or what not. At that time the tax was more than a year due, that is, it was more than a year past due, I should say. So that $600,000 if it was paid as tax, seems to me to have been segregated as a tax and interest. There was interest due, but there has been no segregation. There has been no admission that he owed $600,000. At that time, as a matter of fact, this record discloses he never has admitted $600,000 due. They have been claiming overpayment.

So that this record discloses the $600,000 was not paid as interest, was not paid as tax on interest. I don't know why it was paid. It was simply taken to the Collector's Office, and given to the Collector, and it must be treated simply as a deposit, and comes into the possession of his office——

The MEMBER. You agree, Mr. Maddox it was understood by both parties, it related to this estate.

Mr. MADDOX. Well, I take it this money was paid into his office and they were, perhaps, given a receipt but the Collector put this money into "unidentified accounts." That is the only place he could put it.

48 The MEMBER: He did not have any thought that it was a payment made by somebody else. He knew it was for this particular taxpayer. There was no question about which taxpayer it related to.

Mr. MADDOX. No; I wouldn't say so. From the standpoint of the Government, there is nothing on the Collector's books that it was for account of this taxpayer.

The MEMBER. I understand.

Mr. MADDOX. There was no contention either by the Collector or Commissioner that this payment into the Collector's office was tax or tax and interest. There was no preliminary determination until March 4, 1938. That is the first my record discloses any communication was sent to the taxpayer suggesting any deficiency in this case.

Immediately upon mailing of that letter, and its receipt by the taxpayer, there was a contest, substantially the same as results from the decision in this case, your Honor.

The notice of deficiency was mailed June 30, 1939, and there was also, as the record discloses, a claim filed July 24, 1939.

Now, there has been no indication that the Commissioner has conceded, in any manner, that this amount was paid, or accepted as payment of tax. There wasn't any tax liability due. There was none determined. The stipulation says this

49 $600,000 paid on September 14, 1937, has not been assessed, and is held in the Collector's office in an account known as "unidentified accounts."

The MEMBER. When did the Commissioner make determination that some additional tax was due?

Mr. MADDOX. May 4, 1938.

The MEMBER. May 4?

Mr. MADDOX. Yes, sir; May 4. That was some seven months later after payment.

The MEMBER. Then he determined there was additional deficiency in excess of $600,000?

Mr. MADDOX. That is true.

The MEMBER. Suppose the Commissioner had been sustained in that, Mr. Maddox, wouldn't the Commissioner be foreclosed from trying to collect interest on $600,000, except up to the date of payment? In other words, the date that

the $600,000 was received by the Collector, wouldn't that be the last day upon which the Commissioner could compute any interest, so far as the $600,000 up to the date of payment would call for additional payment of that amount for that interest. In other words, $600,000 does not specify there is due on that particular date $600,000 plus interest.

The MEMBER. I understand that the Commissioner can collect interest from the date that the tax was due to the date that the check was received by the Collector.

Mr. MADDOX. That is on the $600,000?

50 The MEMBER. That is right.

Mr. MADDOX. And then interest on the balance from that date up to the date of payment.

The MEMBER. But I think there would be some indication that this would have to be regarded as a payment of tax, but there was no tax fixed at the moment. The taxpayer has not admitted the tax by showing it on his return, and the Commissioner has not determined it, but having received the money, if he later determines the deficiency, it seems to me, his books would have to show it. I don't see how he can do that sort of thing unless the statute gave him express authority.

Now, there was some payment in the Standard Portland Cement Company case——

Mr. MADDOX. There was a different proposition in that case. They filed a waiver with respect to the assessment of the tax, and all interest would stop 30 days after the waiver.

The MEMBER. My thought was that the waiver was not filed at the time when they did have the right to file any waiver.

Mr. MADDOX. That is true. As I recall it the waives was conditioned on the acceptance of the order by the Commissioner.

The MEMBER. As I understand you, there is no statutory provision that completely defines the question here.

51 The question here is simple. The taxpayer comes in, following filing of the return, showing a certain tax due, and makes payment on that tax, and when the Commissioner has not yet determined whether any more tax is due, the taxpayer comes in and says "Here is $600,000. I anticipate you may say I owe some more tax. Here is $600,000."

The Collector say, to himself at least, there is nothing for him to do with the $600,000 at the moment, because the Commissioner has not determined if there is any more tax due. Even if after that the Commissioner determines deficiency in a greater amount, the taxpayer concedes it and says if the actual tax liability is less than the amount due, the estate should have the funds returned. Is that true?

Mr. DRYE. Yes.

The MEMBER. If it is found to be less than you showed on your return.

Now, we are arguing about what is the statute on this $600,000 which was paid over to the Collector in the meantime, and as you say, there is no particular statutory provision which relates to interest settlements on the payment of a tax which was not due. If it was not a payment of tax, because there was no tax due, if it was not a payment of tax, it seems to me it would be important here to know what it was, be-
52 cause if it would be a payment of tax, when the Commissioner determined the deficiency, I should think it surely became a payment of tax at that time at least for the purpose of stopping interest on the unpaid tax at that time, to the extent of that amount, and that being so, I wonder why I would not have to say that it was payment, so that the taxpayer would get his relief on that basis. I understand that this probably would carry interest with it, even though that is no direct concern of ours. But, it seems to me that the statute says "payment of tax", and I think it would have to be regarded as a payment of tax, even though the Collector at the time was not able to credit it against any assessment.

Mr. MADDOX. May I point out one thing?

The MEMBER. Go ahead on anything you like. I was just thinking out loud, so you could help me.

We had a case here the other day, there was one presented here, where after the Board had determind that there was a deficiency, and in anticipation of appealing, the taxpayer came in here and paid—he did not come in here, he went to the Collector and paid the amount of the tax, and the Circuit Court affirmed the Board.

Now, he comes back here and wants the Board to vacate its decision, which has been affirmed, and hold that there is an overpayment of tax. Of course, the testimony is there
53 was an overpayment, and the Commissioner say he will give him the money back without interest, because he had no business to pay it. If there was no deficiency. If the Board determined there was no deficiency they cannot get interest from the government, if they are putting their money in here, because the Board has no jurisdiction over interest. That may be wrong, but as far as I can see you have a very different situation here because the taxpayer, although he made voluntary payment in this case, as was done in the other case, in this case later the Commissioner had determined that an additional tax was due, and it seems to me that was very helpful to the taxpayer. If the Commissioner had never deter-

mined that any additional tax was due, and the taxpayer had gone into the district court and sued for a refund, then I would be puzzled to know how it would collect this $600,000; because in that case there would be nothing to support it at all; but the fact is that when the Commissioner determined deficiency, it seems to me; if he would determine this as deficiency, he would credit some further payment on it. Now, I may be wrong.

Mr. MADDOX. But the Commissioner still may make assessment and collection of the tax, while this proceeding is going on, and simply because the taxpayer came in and paid $600,000—I don't know, perhaps he would have to assess it.

The MEMBER. I suppose the Commissioner could
54 make an assessment, even if the taxpayer came in and made a voluntary payment. Could the Commissioner receive payment of the tax, even though there was no determination on it?

It is a very interesting question, but I think it would strike me, at the moment—it would be very technical to say, after the Commissioner had determined that an additional amount was due, at which time he had $600,000 in his hands, that he would not have to say, "Well, I have not assessed it and I cannot assess it and yet he made voluntary payment, and he will have a payment for all purposes, this payment is to obviate and it will stop interest, if later it is determined that you do not owe this deficiency, and if you owe less than you showed on your return, you will have to apply for a refund, because that money is in the hands of the Government. Of course, you might have this argument with Mr. Maddox, that the theory of paying interest on the money refunded, is that the Government had unrestricted and free use of the money in the meantime, and the taxpayer did not, but on the contrary had been out of pocket this much and had not had the free use of it pending determination and audit, and therefore, ought to be compensated to that extent.

You might argue in this case that the Commissioner did not have the free use of it, because under the statute he never could
55 assess it. He might determine it due in the audit, and he could get the money, but that would be a restriction on the money in his hands, because he had not assessed it.

Mr. MADDOX. There is another point about it. I don't think the Commissioner should be put in the position of accepting a forced loan from the taxpayer, and pay on that loan 6% interest.

The MEMBER. It seems to me, unless it is different, and the taxpayer says, "This is additional revenue that I failed to return, and I am convinced I am going to have to pay some more tax. I think it is at least $600,000 and I will pay you that

"much," and then the Commissioner comes along and says, "That is right, you owe some more taxes, but it is more than $600,000; you owe me a million or two million," and the taxpayer advanced the money in anticipation of a claim.

Mr. MADDOX. Except this, and it is apparently the fact in this case, at the time he was paying the $600,000 and wanted to have it held in the event it would have to be paid.

The MEMBER. Well, this argument, stated simply, is that the amount should not be regarded as payment, unless the Commissioner accepts the amount as payment for something on his books which has been assessed. Isn't that a simple statement of the issue?

Mr. MADDOX. That is substantially it. Now, it seems
56 to me that the Commissioner could refund interest on what has been paid as tax. Now, suppose that taxpayer that this was a valid tax, and the tax was in process of determination, and some figure had been reached, and he believed it would be treated as tax—and this record discloses there has been determination by the Commissioner that there was a deficiency—now, of course, when we examine the return, suppose the taxpayer gets scared and starts making a little audit of his own, and then comes in and pays the tax, and afterward makes claim for refund? It seems to me that there is something inconsistent there.

The MEMBER. That does not put you on very much ground, Mr. Maddox. Frequently a taxpayer will report on his return certain items and at the same time put a rider on there stating that he does not think those items are proper, or in error, or something like that, and pays the tax shown on the return, and thereafter files claim for refund? So there is some inconsistency there, that is not present here. The taxpayer here, in fact, says, "I will give you $600,000, in the event there is any deficiency." "You have not found one so far, but I will give you the money in the event you do."

Mr. MADDOX. Well, the statute refers to payment on account of taxes, so therefore, it is necessary that all of the facts be before this Board to determine the amount of tax liability. Now——

57 The MEMBER. Now, let me interrupt you before I forget it. You know the Board has a case, at least one, that I can remember, involving the question where a corporation, the taxpayer, paid some real estate taxes before they were assessed, and it runs in my mind that in the same case there were a couple of other things involved. The question there was whether the taxpayer was entitled to reduction for the amount paid on account of real estate taxes; and there was

some mention made that another corporation turned over some money to this corporation for the purpose of paying taxes, which were not assessed. There was some argument by the Collection as to whether they turned over this money in anticipation of taxes going to be paid, and I am wondering if there may be something which is analgyous here.

Mr. DRYE. Taking that particular case, I don't think it different from the law laid down by the Board in similar cases.

In the Lehigh Valley Coal Sales case the Board held that a voluntary payment of taxes made without assessment should have been given effect in determining tax liability for the year in respect to which such payment was made. That is the Lehigh Valley Coal Sales Company, 15 BTA 1401.

It is disposed of rather summarily there. It is not discussed at great length.

58 A similar case is William Silver & Co., 10 BTA, and there the Board held that the amount of tax paid by the taxpayer, but not assessed by the Collector, should be considered in computing in statutory deficiency.

Now, when we come to the question of whether we are imposing anything on the Commissioner, we must view the letter written to the Collector in which it was stated:

"We are sending you herewith check to your order in the amount of $600,000 as a payment on account of any deficiency Federal Estate Tax which may be determined to be due from said decedent's estate."

There the purpose of the payment was disclosed, and we asked that the routine receipt be sent us. That was the statement. There is no question about the facts.

The Commissioner was not forced to accept the payment. He could have returned it; the Commissioner could have returned it promptly. But, as a matter of fact, the Commissioner from that day until this has never raised any question about it in any way.

The MEMBER. The question of these voluntary payments come up every once in a while. I don't know much about the Collector's system, but in the case I cited I don't think the Collector assessed the amount, but just kept it in unidentified accounts in his office, so that he was not committed one way or another, and he did not give it to the Government and the taxpayer was still able to get it back.

59 The thing disturbing me is Mr. Drye's point that when you make a return the Commissioner immediately assesses the amount shown in the return.

Mr. MADDOX. Yes; that is his assessment. That is his authority.

The MEMBER. Do you want to file a memorandum, Mr. Maddox, or just a statement?

Mr. MADDOX. I am satisfied just to submit our oral statement. I want to make this observation: the case cited in Mr. Drye's brief, Atlantic Oil Producing Co., the official citation is 35 Federal Supplement 766; that case is distinguished from this case. In that case it was never said that the tax was due, but the taxpayer made tentative payment, and that the government was powerless at the time the money was paid to determine how much tax was due. I don't think it is necessary to go into the facts at great length at this time.

I would also refer your Honor to the decision of the United States District Court for the Southern District of New York, in Henry L. Moses as Executor of the Estate of Theodore Goldsmith, deceased, vs. the United States.

Mr. DRYE. I have referred to that in my memorandum.

Mr. MADDOX. That case holds contrary to the decision I have referred to by the Court of Claims in the Atlantic Oil Producing case.

60 The MEMBER. All right. The case stands submitted. I will take it under advisement.

(Thereupon, the hearing in the above-entitled matter was adjourned.)

61 United States Board of Tax Appeals, Washington

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

In accordance with the petitioner's recomputation of tax filed with the Board on February 27, 1942 pursuant to the Board's memorandum opinion entered on December 20, 1941, and the accompanying memorandum, it is

Ordered and decided: That there is an overpayment of estate tax in the amount of $1,300,411.02, all of which was paid within three years before the filing of claim for refund.

(Signed) J. E. MURDOCK, *Member.*

Enter: Entered May 12, 1942

Memorandum to accompany decision

MURDOCK. The parties have submitted recomputations under Rule 50 in which they agree that the tax liability of the estate computed in accordance with the opinion of the Board is $7,491,556.07. They had previously stipulated that "the petitioners have made the following payments on account of the Federal Estate Tax with respect to decedent's estate: May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed and is held in the Collector's office in the account known as 'unidentified accounts')."

The parties are in disagreement as to whether or not the $600,000 should be considered in determining the overpayment within the meaning of Section 912 of the Internal Revenue Code. That section gives the Board jurisdiction to determine the amount of overpayment if it "finds that the executor has made an overpayment of tax." The Commissioner apparently proposes merely to return the $600,000 as if it had been a deposit. He contends that it is not a part of the overpayment. Interest must be paid on overpayments which are refundable, but the Board has no jurisdiction over or concern with the question of interest.

62 The estate paid all of the tax shown to be due on the return, and made the additional payment of $600,000 in anticipation of the determination of a deficiency. The Commissioner shortly thereafter determined a deficiency in excess of $600,000.

The Commissioner has not filed a brief and has not cited any authorities in support of his computation except the case of Moses v. United States, 28 Fed. Supp. 17. The executor in that case, before filing the estate tax return, sent a check for $20,000 to the collector. The correct tax liability, as subsequently determined, was about $12,000. The court held that the excess over that amount was not a payment of tax and there was no overpayment. It reasoned that there could be no payment unless the money passed from a debtor to a creditor for the purpose of extinguishing a debt, and there was no debt at the time the payment was made. Three other cases are to the contrary and support the petitioner's contention: Atlantic Oil Producing Co. v. United States, 35 Fed. Supp. 766; Chicago Title & Trust Co., Executor, v. United States,—Fed. Supp.—(Jan. 7, 1942); Busser v. United States,—Fed. Supp.—(Jan. 23, 1942). If money merely passes in discharge of an existing debt, no overpayment will result. There can be no overpayment unless more is paid than is actually owed under the

statute. The parties have stipulated that the $600,000 was paid on account of the Federal estate tax with respect to the decedent's estate. The Commissioner later determined that a larger amount was due. He had not returned the $600,000 as he could have done, but he still had it in his hands, available to discharge the additional tax had it turned out that such additional tax was due under the statute. Compare the definition of a deficiency in Section 307 of the Revenue Act of 1926. The $600,000 must be considered as a payment in determining the overpayment of tax.

Entered May 12, 1942.

63 In the United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER OF REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENT ON REVIEW.

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Comes now Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Adrian H. Larkin, residing at Southampton, New York, Albert Stickney, residing at 8 East 93rd Street, New York, New York and Central Hanover Bank and Trust Company, with its principal place of business located at 70 Broadway, New York, New York, are the duly appointed, qualified and acting executors of the

64 Estate of Henry H. Rogers, deceased; that the Estate

Tax Return, Form 708, filed on behalf of the decedent's estate, was filed with the Collector of Internal Revenue for the First District of New York, whose office is located in Brooklyn, New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit:

The Estate Tax Return filed on behalf of the decedent's estate disclosed a tax liability of $8,191,967.09. The decedent, at the date of his death, possessed a general power of appointment over certain property conferred upon him under the will of his father, Henry H. Rogers, Sr. The will of the decedent's father provided that in the event the power of appointment should not be exercised, the property in question should pass to the heirs at law of the decedent, in accordance with the laws of the State of New York. The heirs at law of the decedent were his widow, daughter and his son. The decedent by his will exercised such power of appointment by appointing 6.667% of the property outright to his widow, daughter and a grandson in equal shares and appointed a one-third share of the residue to his widow and a like one-third share to his daughter for life with remainders over and the other one-third share
65 outright to his grandson.

Under date of June 29, 1939, the Commissioner of Internal Revenue mailed a notice to the executors aforesaid, respondents on review, asserting a deficiency in the estate tax in the amount of $849,524.19. In determining the deficiency the Commissioner included in the decedent's gross estate the full value of the property over which the decedent possessed a general power of appointment.

Under date of September 15, 1939, the executors aforesaid filed a petition with the Board of Tax Appeals for a redetermination of the deficiency in the estate tax as above mentioned. After the answer of the Commissioner was duly filed, the case was submitted to the Board for decision. The Memorandum Opinion of the Board was entered December 20, 1941, and the final order of the Board, redetermining the deficiency, was entered May 12, 1942, in which it was ordered and decided that there is an overpayment of estate tax in the amount of $1,300,411.02.

The Board of Tax Appeals in redetermining the tax liability, as above stated, erroneously held and decided that the property

over which the decedent exercised a general power of appointment was subject to be included in the decedent's gross estate only to the extent of the interest passing to the grandson and the remainder interests above referred to, inasmuch as the interests passing to the widow and daughter were less than that which they would otherwise have taken had the power not been exercised, and that the Board in determining the over-
66 payment in the estate tax, erroneously treated a deposit of $600,000 made with the Collector of Internal Revenue to be applied against the deficiency, if any, as should be ultimately determined, constituted a payment of tax.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination of the deficiency in estate tax, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the property over which the decedent possessed a power of appointment under his father's will, was subject to be included in the decedent's gross estate only to the extent of the remainder interests in one-third thereof less 6.667% placed in trust for the life use of his widow, a remainder interest in one-third thereof less 6.667% placed in trust for life use of his daughter and one-third thereof passing to his grandson Peter, as property passing under a general power of appointment exercised by the decedent.

2. The Board of Tax Appeals erred in not holding and deciding that all of the property over which the decedent possessed a power of appointment under his father's will was subject to be included in the decedent's gross estate as property passing under a general power of appointment exercised
67 by the decedent.

3. The Board of Tax Appeals erred in holding and deciding that no part of the property over which the decedent possessed a general power of appointment, is subject to be included in the decedent's gross estate pursuant to the provisions of Section 302(a) of the Revenue Act of 1926.

4. The Board of Tax Appeals erred in failing and refusing to hold that all of the property over which the decedent held a power of appointment under his father's will was subject to be included in the decedent's gross estate pursuant to the

provisions of Section 302(a) of the Revenue Act of 1926, as representing the extent of the decedent's interest therein as of the date of his death.

5. The Board of Tax Appeals erred in entering its order of redetermination that there is an overpayment of estate tax in the amount of $1,300,411.02, in that the Board erroneously held that the deposit of $600,000 made with the Collector of Internal Revenue to be applied against the deficiency, if any, as should be ultimately determined, constituted a payment of tax.

6. The Board of Tax Appeals erred in entering its final order of redetermination that there is an overpayment in the estate tax in the amount of $1,300,411.02.

7. The Board of Tax Appeals erred in failing and refusing to enter its final order of redetermination that there is a
68 deficiency in the estate tax, as determined by the Commissioner, subject to adjustments stipulated.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
R. L. W.
(Sgd.) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel
Bureau of Internal Revenue.

Of Counsel:
RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.
RFS–spt 8–3–42.

69 UNITED STATES OF AMERICA,
District of Columbia, ss:

RALPH F. STAUBLY, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents

thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to these matters he believes it to be true.

(Sgd.) RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to before me this 4th day of August, 1942.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My commission expires November 15, 1942.

70 In the United States Circuit Court of Appeals for the Second Circuit.

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received August 12, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To CENTRAL HANOVER BANK AND TRUST COMPANY, *as Executor of the Last Will and Testament of Henry H. Rogers, deceased, 70 Broadway, New York, New York.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August, 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel, *Chief Counsel,*
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5th day of August, 1942.

apt 8-3-42

CENTRAL HANOVER BANK & TRUST CO.
(S) A. F. SMITH, *Respondent on Review,*
Asst. Vice Pres.

71 In the United States Circuit Court of Appeals
for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received Aug. 12, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To:

JOHN W. DRYE, JR., Esq.,
HAROLD A. DONEGAN, Esq.,
ARTHUR W. SIEGRIST, Esq., *70 Broadway, New York City.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel.
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors

mentioned therein, is hereby acknowledged this 10 day of August 1942.

(s) JOHN W. DRYE,
(s) HAROLD A. DONEGAN,
(s) ARTHUR W. SIEGRIST,
Attorneys for Respondents on Review.

August 5th, 1942.

72 In the United States Circuit Court of Appeals
for the Second Circuit

B. T. A. No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENTS ON REVIEW

Received Aug. 14, 1942. U. S. Board of Tax Appeals.

Notice of filing petition for review

To: ALBERT STICKNEY, *As Exec. of the Last Will and Testament of Henry H. Rogers, deceased, 3 East 93rd Street, New York, New York.*

You are hereby notified that the Commissioner of Internal Revenue did, on the 4th day of August, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 4th day of August 1942.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of August 1942.

(s) ALBERT STICKNEY,
Respondent on Review.

73 United States Board of Tax Appeals

Docket No. 100026

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of Facts

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts may be taken as true and that the same may be considered as offered in evidence by the parties to this proceeding; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. Henry H. Rogers, (hereinafter referred to as "decedent"), died on July 25, 1935, a resident of Southampton, Suffolk County, New York. Petitioners are the duly qualified and acting executors of decedent's last will and testament, letters testamentary having been duly granted to them by the Surrogate's Court of Suffolk County on October 28, 1935. Said letters are still in full force and effect. Petitioner Adrian H. Larkin resides at Southampton, New York, and petitioner Albert Stickney resides at 130 East 67th Street, New York City.

74 Petitioner Central Hanover Bank & Trust Company is a corporation duly organized and existing under the laws of the State of New York having its principal office and place of business at 70 Broadway, New York City.

2. The Federal estate tax return for the estate of said decedent was filed with the Collector of Internal Revenue for the First District of New York on July 24, 1936. Petitioners have made the following payments on account of the Federal estate tax with respect to decedent's estate; May 18, 1936, $1,000,000; July 24, 1936, $7,191,967.09; and September 14, 1937, $600,000 (this last payment has not been assessed, and is held in the Collector's office in the account known as "unidentified accounts").

3. On July 24, 1939, petitioners filed with the Collector of Internal Revenue for the First District of New York a claim for refund in the amount of $1,505,398.64, a true copy of which is annexed hereto, marked Exhibit "A" and made a part hereof.

4. Decedent's father, Henry H. Rogers (hereinafter referred to as Rogers, Sr.), died on May 19, 1909, leaving a last will

and testament which was duly admitted to probate in the Surrogate's Court of New York County, State of New York, on May 28, 1909. A copy of said last will and testament is annexed hereto, marked Exhibit "B" and made a part hereof. Article Eighth of said last will and testament provided in part as follows:

EIGHTH

All the rest, residue and remainder of my property both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my trustees, hereinafter named, in trust, however, for the uses and purposes following:

75 I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descendants of deceased children one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe, and Henry Huddleston Rogers, Jr.

* * * * *

IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence af such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

5. Decedent attained the age af forty years on December 28, 1919, and thereafter the share of the trust created for decedent under said Will of his father to which he then became entitled was paid over to him.

6. By Articles Twelfth and Sixteenth of decedent's last will and testament, a true copy of which is annexed hereto, marked Exhibit "C" and made a part hereof, decedent exercised the power of appointment over the balance of said trust given to him by the said Will (Exhibit "B") of his father, Rogers, Sr.

7. At the time of decedent's death, he left surviving him a widow, two children by his first wife—Henry H. Rogers, Third, and Millicent Rogers Balcom—and three grandchildren, Peter Salm, Arturo Henry Peralta Ramos and Paul Jamie Peralta Ramos, the children of Millicent Rogers Balcom. The widow was 45 years of age when decedent died and she remarried on April 30, 1937 and after that date was and is now known as Pauline V. Hoving; Millicent Rogers Balcom, the daughter, was 33 years of age, and decedent's son, Henry H. Rogers, Third, was 30 years of age. Peter Salm, who was the son of Millicent Rogers Balcom, was eleven years of age, and the two Ramos children, sons of Millicent Rogers Balcom, were seven and four years of age, respectively.

8. Without admitting the relevancy thereof, the petitioners admit that during the pendency of the administration of decedent's estate, decedent's widow filed on April 23, 1936 an application with the Surrogate's Court of Suffolk County for a determination of her right under Section 18 of the Decedent Estate Law to elect to take against the provisions of the last will and testament of decedent, and the effect of such an election, although a waiver of her right of election, duly executed by the widow on January 13, 1934 as prescribed by said Section 18, was attached to and filed in said Surrogate's Court with the decedent's will dated January 13, 1934 (Exhibit "C"). The Surrogate's Court of Suffolk County dismissed the application of the widow on July 13, 1936. An appeal was taken by the widow from the decision of the Surrogate and on February 19, 1937 the New York Supreme Court, Appellate Division, Second Department, affirmed the decision of the Surrogate, such decision being reported in 250 App. Div. (New York) 26, 293 N. Y. Supp. 626.

77 9. Without admitting the relevancy thereof, the petitioners admit that in a proceeding in the Surrogate's Court of New York County involving the judicial settlement of the account of the trustees of said trust created under Rogers, Sr.'s will for the benefit of decedent, Henry H. Rogers Third, son of decedent, filed an answer in which he attacked the legality of his father's exercise of the power of appointment. The Surrogate's Court of New York County held against the contentions of the decedent's son, the decision being rendered on May 23, 1938, and reported in 168 Misc. (N.Y.) 63, 6 N. Y. Supp. (Second Series) 254.

10. By a decree of the Surrogate's Court of New York County, entered January 12, 1939, in the proceeding involving the judicial settlement of the account of the trustees of said trust created under Rogers, Sr.'s will for the benefit of decedent, a

true copy of said decree being attached hereto marked Exhibit "D" and made a part hereof, it was determined, among other things, that as to 6.667% of the corpus of said trust the appointment in further trust under Article Twelfth of decedent's will (Exhibit "C") was invalid but that said 6.667% of said trust corpus had been validly appointed by Article Sixteenth of said will outright in equal shares to decedent's widow, Pauline V. Hoving, his daughter, Millicent Rogers Balcom, and his grandson, Peter Salm. It was also determined by said Surrogate's decree that the appointment in further trust for the benefit of decedent's widow, Pauline V. Hoving, and daughter, Millicent Rogers Balcom, of two-thirds of the balance of the corpus of said trust fund remaining after the payment of said
78 6.667% thereof, was valid. It was further held that the appointment in trust for the life of Peter Salm was invalid under Article Twelfth since Peter Salm was not in being at the time of the death of Rogers, Sr. but that under Article Sixteenth the appointment to Peter Salm was valid.

11. The "heirs at law" of decedent, "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of said Will of decedent's father were his widow, Pauline V. Hoving, his daughter, Millicent Rogers Balcom, and his son, Henry H. Rogers, Jr., who would have taken decedent's real property in equal shares if he had not left a will.

12. The net value at the date of decedent's death of the property in the trust created under Rogers, Sr.'s will for the benefit of decedent amounted to $8,428,949.60. The value of decedent's net taxable estate, exclusive of the value of the property in said trust, amounts to $14,592,436.20 under the provisions of the Revenue Act of 1926 and $14,642,436.20 under the provisions of the Revenue Act of 1932, as amended by the Revenue Act of 1934. It is further agreed that if all of the property in said trust is held to be includible in decedent's net taxable estate, the net taxable estate of decedent under the Revenue Act of 1926 and the Revenue Act of 1932, as amended by the Revenue Act of 1934, amounts to $23,021,385.80 and $23,071,385.80, respectively. (The aforesaid amounts
79 give effect to an agreed settlement by the parties of all raised in the petition, with the exception of the issue relating to the value of property passing under power, and also certain affirmative issues which respondent has contemplated raising in these proceedings).

13. It is also agreed by petitioners and the respondent that the Board enter its decision under Rule 50 in accordance with the facts herein stipulated, determining an overpayment or

the correct deficiency to be assessed regardless of whether the amount of the deficiency, if any, is larger than the amount of the deficiency proposed by respondent in his deficiency notice of June 29, 1939. (Respondent in presenting this stipulation at the hearing before the Board makes claim for any increased deficiency.)

14. While respondent contends that the net value at the date of decedent's death of the entire property held in the trust created under Rogers, Sr.'s will for the benefit of decedent is to be included in decedent's net taxable estate without any diminution thereof, it is agreed that the amount of the property comprising said trust which was distributed outright to decedent's widow, Pauline V. Hoving, and decedent's daughter, Millicent Rogers Balcom, under the provisions contained in Article Sixteenth of decedent's will, is $187,319.36 to each.

15. The present worth of a life interest in $1.00 of a person 45 years of age is $0.57143. The present worth of a life interest in $1.00 of a person 33 years of age is $0.67383. Respondent, in his notice of deficiency dated June 29, 1939, included in decedent's net taxable estate the entire net value of the
80 property held in the trust created under Rogers, Sr.'s will for the benefit of decedent as computed by him to be $8,465,040.74. Respondent now contends that the aforesaid property should be valued at $8,428,949.60 and that such amount is includible in the net taxable estate of the decedent as the value of the property passing under the exercise of the power. Petitioners contend that the net taxable estate should not include the value of the property comprising said trust which passed outright to said Pauline V. Hoving and Millicent Rogers Balcom and the value of their respective life interests in such property.

16. Petitioners are entitled to credit for state, estate, inheritance, legacy or succession taxes paid, in addition to the amount allowed in the respondent's notice of deficiency dated June 29, 1939, of any and all amounts paid for New York and Massachusetts inheritance and estate taxes in accordance with section 301 (b) of the Revenue Act of 1926, as amended.

(Sgd) JOHN W. DRYE, Jr.,
(Sgd) HAROLD A. DONEGAN,
(Sgd) ARTHUR W. SIEGRIST,
Attorneys for Petitioners.
E.C.A. J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

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Exhibit A

Form 843, Treasury Department, Internal Revenue Service, Revised June, 1930.

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

COLLECTOR'S STAMP
(Date received)

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps, Adrian H. Larkin, Albert Stickley and Central Hanover Bank and Trust Company, as Executors of the Last Will and Testament of Henry H. Rogers, deceased.
Business address, 70 Broadway, New York, New York.
Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st District, New York.
2. Period (if for income tax, make separate form for each taxable year) from _____, 19____, to _____, 19____.
3. Character of assessment or tax, Estate.
4. Amount of assessment, $7,791,967.09; dates of payment, July 24, 1936, and September 14, 1937.
5. Date stamps were purchased from the Government _____
6. Amount to be refunded _____ $1,505,338.64
7. Amount to be abated (not applicable to income or estate taxes) _____ $_____
8. The time within which this claim may be legally filed expires, under Section 319 of the Revenue Act of 1926, on July 24, 1939, and September 14, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

See annexed statement.

Attach letter size sheets if space is not sufficient.

CENTRAL HANOVER BANK AND TRUST COMPANY,
Signed by C. L. HERTERICH,
Asst. Vice-President.
ADRIAN H LARKIN,
ALBERT STICKLEY.

Sworn to and subscribed before me this 24 day of July 1939.

ARTHUR J. QUINN,
Notary Public, New York County.

N. Y. Co. Clk's No. 15, Reg. No. 1Q17. Kings Co. Clk's No. 5, Reg. No. 1012. Commission expires March 30, 1941.

(SEE INSTRUCTIONS ON REVERSE SIDE)

82

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	Account No. of— Page	Account No. of— Line	Amount assessed	Paid, abated, or credited — Date	Paid, abated, or credited — Amount	Pd Ab Cr
						$		$	
					Total.	$		Total.	$

Claim No.

Claim No.

I certify that the records of this office show the following facts as to the purchase of stamps:

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp state— Serial number	If special tax stamp state— Period commencing
					$		

Claim examined by

Chief of Division

Collector of Internal Revenue. (District)

COMMITTEE ON CLAIMS

Amount claimed $

Amount allowed $

Amount rejected $

INSTRUCTIONS

1. The claim must set forth in detail and under oath, each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf

of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collecter, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

83 STATEMENT

ESTATE OF HENRY H. ROGERS.

1. Adjustments with respect to Items 34 and 55, Schedule C of return determined in letters from Treasury Department, dated May 4, 1938 and June 29, 1939 and bearing symbols MT-ET-8941-1st New York.

2. Adjustments with respect to Items 1, 2 and 4, Schedule D-2 of return determined in said letters.

3. Adjustments with respect to increased and additional funeral expenses, executors' commissions, miscellaneous administration expenses and debts determined in said letters.

4. The fair market value of Item 1, Schedule F of return to be included in the gross estate should be $4,841,128.45.

5. The deduction for executors' commissions should include the amount of additional commissions to be awarded to the executors upon the settlement of their final account.

6. The deduction for attorneys' fees should include any additional amount actually paid for same through the closing of the estate.

7. Decedent's indebtedness to Bankers Trust Company, amounting to $21,875 and referred to in said letter dated June 29, 1939, should be allowed as a deduction.

8. Credit for State estate and inheritance taxes should be allowed to the full extent of 80% of the tax under the 1926 Revenue Act.

84 *Exhibit B*

LAST WILL AND TESTAMENT OF HENRY H. ROGERS

DATED MAY 7, 1907

85 I, Henry H. Rogers, of the City of New York, do hereby make, publish and declare this my last will and testament, hereby revoking all former Wills by me made.

FIRST

I give, devise and bequeath to my wife, Emilie R. Rogers, during her life, the use of my house, known as Number 3 East 78th Street, in the City of New York, and of all my linen, bric-a-brac, works of art, household goods and furniture (useful and ornamental), china, plate, silverware, books and pictures (except as hereinafter provided in the Fourth Article of this Will; and I also give and devise to my said wife, during her life, the use of my stable and garage, known as Number 62 East 58th Street, in the said City, and of all my automobiles, horses and carriages and the harness and the appurtenances thereto belonging; all taxes and water rates and the cost of all necessary repairs on the said real estate, to be paid by my said wife while she has the use of the same.

SECOND

I give and bequeath to my Trustees, hereinafter named, such sum, not less than Two million, five hundred thousand Dollars ($2,500,000), nor more than Three million Dollars ($3,000,000), as, in the opinion of my said Trustees, shall be amply sufficient to produce an annual income of One hundred thousand Dollars ($100,000), in trust, however, for the uses and purposes following:

I. To apply, during the life of my said wife, the income thereof, to the extent of One hundred thousand Dollars ($100,000) per year, in equal quarterly payments to her use, and, during the same period, to apply the income, if any, in excess of that sum to the use of my lineal descendants, in equal shares, per stirpes and not per capita.

II. Upon the death of my said wife, to dispose of the principal of the said Trust Fund as part of my Residuary Estate, in the manner directed by the Eighth Article of this Will.

86 I declare that the provisions of this Will for the benefit of my said wife are to be in lieu and bar of her dower and of all other right, share or interest of, in or to my estate.

THIRD

I give and devise to my son, Henry H. Rogers, Jr., my summer home at Fairhaven, Bristol County, Massachusetts, together with all the buildings thereon and the contents thereof and the appurtenances thereto, and all my land in the Town of Fairhaven aforesaid; to have and to hold the same to him his heirs and assigns, forever.

FOURTH

I give and bequeath to my said son all my jewelry, wearing apparel, personal ornaments and effects.

I also give and bequeath to my said son the possession and use during his life of the pastile portrait of my grandfather; and, on the death of my son, I give and bequeath the said portrait to my grandson, Henry H. Rogers, 3d; or if he does not survive my son, then I give the said portrait to the eldest male issue of my son, living at his death. If he should leave no male issue; then I give and bequeath the said portrait, on the death of my son, to my eldest daughter then living.

FIFTH

I give and bequeath to my trustees, hereinafter named, the following sums, in trust, for the uses and purposes following.

I. Two hundred thousand Dollar ($200,000) to apply the income thereof to the use of my brother, Rufus A. Rogers, during his life.

II. One hundred thousand Dollars ($100,000), to apply the income thereof to the use of Maud Rogers, wife of my said brother, Rufus A. Rogers, during her life.

III. Fifty Thousand Dollars ($50,000), to apply the income thereof to the use of Marion Rogers, daughter of my said brother, Rufus A. Rogers, during her life.

IV. Fifty thousand Dollars ($50,000), to apply the income thereof to the use of Rowland Rogers, son of my said brother, Rufus A. Rogers, during his life.

V. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Sarah T. Huttleston, daughter of the late Henry Huttleston, during her life.

87 VI. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Julia Tuck, widow of Samuel P. Tuck, of Brooklyn, New York, during her life.

VII. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Agnes I. Gardner, the widow of Theodore Gardner, during her life.

VIII. Twenty thousand Dollars ($20,000), to apply the income thereof to the use of my cousin, Jane W. Nye, of New Bedford, Massachusetts, widow of Clement Nye, during her life.

IX. Ten thousand Dollars ($10,000), to apply the income thereof to the use of Jennie Nye, daughter of my cousin, Jane W. Nye, during her life.

X. Ten thousand Dollars ($10,000), to apply the income thereof to the use of Mary Nye, daughter of my cousin, Jane W. Nye, during her life.

Upon the death of each of the beneficiaries named in this Fifth Article, to dispose of the principal sum held for such beneficiary as part of my Residuary Estate, in the manner directed by the Eighth Article of this Will.

SIXTH

I give and bequeath to the Town of Fairhaven, in the State of Massachusetts, the sum of One hundred thousand Dollars ($100,000), in trust however, as a permanent endowment fund; and I direct that the income thereof be applied toward the maintenance of the Primary and Grammar Schools of the said Town of Fairhaven.

SEVENTH

I exonerate and discharge all legatees under this Will from the payment of any indebtedness there may be owing to me by them at the time of my death.

EIGHTH

All the rest, residue and remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my Trustees, hereinafter named, in trust, however, for the uses and purposes following:

I. To divide the said property into as many equal shares, as I shall leave children me surviving, and lineal descend-
88 ants of deceased children, one share for each child and one share for the lineal descendants of each deceased child; the names of all my children now living being Anne Engle Benjamin, Cara Leland Broughton, Mai Rogers Coe and Henry Huttleston Rogers, Jr.

II. To convey, transfer, and pay over to the lineal descendants of any child of mine, who shall not be living at the time of my death, the share set apart for such lineal descendants, in equal shares, per stirpes and not per capita.

III. To convey, transfer, and pay over to each child of mine, who at the time of my death shall have attained the age of forty years, one-half of the principal of the share set apart for such child, as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child, during his or her life; and, upon the death of the said child,

to convey, transfer, and pay over the principal thereof to such persons or corporations and in such manner, as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer, and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer, and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York.

NINTH

I direct that in case any litigation whatever arises in respect to this Will or any of its provisions or its probate or concerning the Trusts hereby created, or any of them, all the costs, disbursements, and allowances awarded by the Court to all the parties concerned in such litigation, and also all the costs, disbursements, counsel fees, and expenses of every name, nature, and description, which may be incurred by the Executors of or the Trustees under this Will in defending or preparing to defend any such legal proceedings, or in taking advice with respect to their rights and duties concerning the same, or with respect to the construction of this Will or any question growing out thereof, shall be charged against the amount coming under this Will or otherwise from my Estate to the persons commencing or joining in such legal proceedings against the said Executors and Trustees and shall be considered as so much money paid to such persons or applied to their use, with like effect, in every respect, as if the same amount of money or its equivalent had been paid, transferred, or conveyed directly to them by my said Executors and Trustees. The statement of the amounts incurred by my said Executors or Trustees, as aforesaid, shall be accepted as conclusive upon

any accounting by them with respect thereto, both as to the reasonableness of any counsel fees paid and as to the correctness of all payments made.

TENTH

I direct my Trustees to apply the income of all securities at any time held by them, to the use of the beneficiary for whom they are held, irrespective of the price paid for them or of their market value at any time; it being my intention that no part of such income shall be applied as a sinking fund to offset the gradual loss of the premium upon or market value of any such securities.

ELEVENTH

I hereby give my Executors and Trustees, acting under this Will, full power and authority, in their discretion, to hold and retain any property coming to them under this Will, in the same form of investment as that in which it may exist at the time of my death, although it may not be of the character of investments now permitted by law to Trustees. I also give to my said Executors and Trustees full power and authority, in their discretion, to sell, lease or exchange the whole or any part of such property, whether real or personal, and to invest and reinvest the proceeds in such amounts as they may see fit, in real estate in the State of New York, or elsewhere, or in Bonds of any State or Government, within or without the United States, or in bonds, notes or other obligations, secured by mortgage on real estate within or without the State of New York, or in the Stocks or Bonds of such Railroad or other Companies
in any part of the United States or Canada, as, at the
90 time of such investment, are in good credit and standing; or with the written consent of the beneficiary, in corporate or other Stocks or Securities or other personal property of any kind or description, although the same may not be of the character permitted for Trustees' investments by the ordinary rules of law.

TWELFTH

I hereby authorize my Executors and Trustees to compromise and adjust any claim, of whatever kind, which may be made against or in favor of my estate, upon such terms and in such manner as may to them, in their absolute and uncontrolled discretion, seem advisable.

THIRTEENTH

I appoint my son, Henry H. Rogers, Jr., John W. Sterling, of New York City, Walter P. Winsor, of Fairhaven, Massachusetts, and The Farmers' Loan and Trust Company, of the City of New York, the Executors of and Trustees under this Will. It is my wish, however, that my said son shall not act as Trustee for the share set apart for his own benefit. I direct that no security be required of any of my Executors or Trustees in the performance of their duties as such.

FOURTEENTH

Upon the death, resignation or failure to act of any one of my individual Trustees, I authorize and empower the remaining two Trustees, by an instrument in writing, duly executed and acknowledged, to appoint an associate Trustee to act with them hereunder and to appoint a successor of either of them, and in case, at any time, the number of the individual Trustees hereunder should be reduced to one, I authorize and request him, within sixty days thereafter, by an instrument in writing, duly executed and acknowledged by him, to appoint an associate Trustee or a successor; and, in case he should fail to do so within the said period of sixty days, I authorize and request my children, then surviving, to do so. Any person so appointed under the terms of this Article shall, without giving any security, have the same rights, powers, discretion and obligations, as if he had been originally designated and appointed a Trustee by the terms of this Will.

91 In witness whereof, I have hereunto set my hand and seal this seventh day of May, 1907.

HENRY H. ROGERS. [SEAL]

The foregoing instrument was, on the day of the date thereof, signed, sealed, published and declared by Henry H. Rogers, the Testator therein named, as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

The words "John W. Sterling of New York City" inserted by the Testator in the Thirteenth Article, before execution.

CORTLAND BETTS,
31 Hobart Avenue, Summit, New Jersey.
GEO. H. CHURCH,
1002 Madison Avenue, New York City.
KATHARINE I. HARRISON,
1354 Dean St., Brooklyn, N. Y.

92 *Exhibit C*

LAST WILL AND TESTAMENT OF HENRY H. ROGERS DATED JANUARY 13, 1934.

Date of death: July 25, 1935—Date of probate: October 28, 1935

93 Last Will and Testament of Henry H. Rogers

I, Henry H. Rogers, of Southampton, Long Island, New York, do hereby make, publish and declare the following as and for my Last Will and Testament, hereby intending to dispose of all property, real, personal and mixed, of whatsoever kind and wheresoever situated, of which I may die seized or possessed, and all property and estate to which I am or may be entitled and over which I have the power of appointment and disposition under the Last Will and Testament of my father, the late Henry Huttleston Rogers, or otherwise.

First. I hereby revoke any and all wills, codicils and testimentary documents by me heretofore made.

Second. I direct that all my just debts, funeral and testamentary expenses be paid by my Executors as soon after my death as may be practicable.

Third. I give and bequeath all of my ship models wherever located to the United States Naval Academy at Annapolis, Maryland, upon condition, however, that either the Naval Academy or the Navy Department make arrangements to the satisfaction of my Executors and/or Trustees, of which my Executors and/or Trustees shall be sole judges, for the
94 exhibition, maintenance and upkeep of this collection, including provision for a competent expert at an adequate salary who shall at all times be available to do the necessary repairs or upkeep.

If, however, such arrangements satisfactory to my Executors and/or Trustees are not made with the United States Naval Academy or the Navy Department, and so the collection of models will not pass under this Will to the United States Naval Academy, then I give and bequeath the same to my grandson, Peter Alfred Constantin Maria Salm (hereinafter referred to as Peter), if he shall survive me, to and for his own use forever, but if he shall not then be alive, I direct that the same shall fall in and become a part of my residuary estate and be distributed accordingly.

Fourth. I give and bequeath to my wife, Pauline Rogers, a legacy of One Hundred Thousand Dollars ($100,000), in case she shall survive me.

Fifth. I also give and bequeath to my said wife, Pauline Rogers, in case she survives me, all my automobiles, carriages, horses, harness or other equipment thereunto belonging.

Sixth. In case my son, Henry Huddleston Rogers, Jr., (hereinafter referred to as Henry) shall survive me, I give and bequeath to my Trustees hereinafter named a sum in cash or securities of a market value as of the date of my decease of Five Hundred Thousand Dollars ($500,000), upon trust, to
95 hold, invest, reinvest and manage the same during the lifetime of Henry, and to pay the net annual income to Henry in substantially equal quarterly instalments in each year, and upon the death of Henry I give, devise, and bequeath the principal of the trust fund together with any accrued and unpaid income to my heirs at law and next of kin in the shares in which they would respectively be entitled to inherit the same under the laws of New York in force at the date of the death of Henry.

Seventh. I give and bequeath to Peter, in case he shall survive me, a legacy of One Hundred Thousand Dollars ($100,000.); also all of my wearing apparel, personal jewelry, personal bric-a-brac and personal ornaments, also all the contents, in the way of personal property in my summer residence known as the Beach House, at Southampton, including all farm and gardening equipment and supplies of every kind and nature on such place; also my great-great-grandfather Gifford's grandfather clock and the pistols which he carried in the American Revolution and his four-poster bed and also the pastel picture of my great-grandfather Huddleston and his seal and also my saber and my medals and my helmet; absolutely and forever.

Eighth. I give and bequeath to my daughter, Mary Millicent Ramos (hereinafter referred to as Millicent), a legacy of One Hundred Thousand Dollars ($100,000.), in case she shall survive me.

Ninth. I give and bequeath to the following persons
96 the following legacies respectively, upon condition that except as hereinafter otherwise provided, in each case the legatee shall be in my employ at the time of my death, and upon condition that during my life I shall not have made other financial provision to take effect after my death for the benefit of such legatee:

(1) To Fred Douglas Scott, of the Borough of Brooklyn, City and State of New York, a legacy of Twenty-five hundred dollars ($2500.).

(2) To Brook Emanuel, my chauffeur, a legacy of Twenty-five hundred dollars ($2500.).

(3) To Keeble W. Pipe, my valet, a legacy of Twenty-five hundred dollars ($2500.).

(4) To William Macauley, my carpenter, a legacy of Twenty-five hundred dollars ($2500.).

In case Helen M. Bemis shall survive me, I give and bequeath to her, whether or not in my employ at the time of my death, a legacy of Twenty-five hundred dollars ($2500.).

Tenth. In case my wife Pauline survives me, I give, devise and bequeath to my Trustees, in trust, for my wife Pauline, the real estate and premises, with the buildings and improvements thereon, situated in the Town of Southampton, County of Suffolk, State of New York, and generally known as the Port of Missing Men and Cow Neck property, intending thereby to include all the real estate and premises situated in the Town of Southampton, County of Suffolk, State of
97 New York, formerly owned by Sebonac Company of New York, Inc., a domestic corporation, of which I may die seized, together with its contents, furniture, ornaments, plate, silver, china, linen and all household stores and equipment, except as herein specifically otherwise bequeathed, and together with all equipment, farm utensils and garage utensils, of every kind and nature whatsoever, all of which is collectively termed the North Sea property.

I direct that the North Sea property be held by my Trustees in trust for my wife Pauline, during her life, with the right to my wife Pauline to use, occupy and enjoy the same. My wife Pauline shall, within a period of 180 days after the probate of my will and the qualification of one or more of my Executors thereunder, notify my Trustees in writing of her desire to occupy said property or such part thereof as she may designate in such written notification. Upon the death of my wife Pauline, or in case of her failure to give my Trustees the notification aforesaid, prior to the expiration of a period of 180 days after the probate of my will and the qualification of one or more of my Executors thereunder, whichever event shall first happen, the trust hereby created of the North Sea property for the benefit of my wife Pauline shall, without further act on the part of my Executors and or Trustees, terminate. Upon any such termination of the trust, I give, devise and bequeath said North Sea property to Peter, in case he shall then be alive.

98 Anything herein contained to the contrary notwithstanding, in case my wife Pauline shall cease to occupy said North Sea property, or such part thereof as she shall have specified in the written notification to be given by her to my

Trustees as hereinbefore provided, for a period of two years, or shall have notified my Trustees in writing that she no longer desires to use the same, or any part thereof, the trust of the North Sea property hereby created for her benefit shall, without further act by my Executors or Trustees, terminate, and thereupon I give, devise and bequeath said North Sea property to Peter, in case he shall survive.

In case upon any termination of the trust hereby created for the benefit of my wife Pauline, Peter shall not survive, I direct that said North Sea property shall become a part of my residuary estate and shall be disposed of in accordance with the provisions of article Thirteenth of this Will.

In case my wife Pauline shall not survive me, but Peter shall survive me, I give, devise and bequeath said North Sea property to Peter, to and for his own use, absolutely and forever.

In case neither my wife Pauline nor Peter shall survive me, I direct that the North Sea property shall become a part of my residuary estate and shall be disposed of in accordance with the provisions of article Thirteenth of this Will.

Eleventh. I give and bequeath to Peter, in case he survives me, as a further token of my affection, all my guns, fishing rods and shooting and fishing weapons and gear.

99 Twelfth. I hereby exercise the power or powers of disposition and appointment given to me by the will of my said father, the late Henry Huttleston Rogers, and dispose of the property subject thereto as follows:

I direct that said property be divided by my Trustees into equal shares; and

(1)

(a) In case my wife Pauline shall survive me and we shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal share set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with my wife Pauline shall survive the date of her remarriage, I give, devise, and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

(c) In case my wife Pauline shall survive me, but we shall have been divorced or separated by judicial decree, I direct that upon my death only such portion of the principal of said equal share as shall represent in market value one-fifth thereof shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of my wife Pauline, and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of such one-fifth portion and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

The remaining portions of said equal share as shall represent in market value four-fifths thereof I give, devise and bequeath to the issue of my marriage with my wife Pauline who shall survive me, per stirpes and not per capita, or if no issue of our marriage survive me, then to my other issue surviving me, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive me, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of my death.

102 (d) In case my wife Pauline shall have died before me leaving issue of our marriage surviving me, I give, devise and bequeath one of said equal shares to the issue of our marriage surviving me, per stirpes and not per capita.

(2)

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

In case Millicent shall not survive me, but issue of Millicent (other than Peter) shall survive me, I give, devise and bequeath said equal share to and among the issue of Millicent surviving me (other than Peter), per stirpes and not per capita.

103 (3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any

accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter.

In case Peter shall not survive me, but issue of Peter shall survive me, I give, devise and bequeath said equal share to and among the issue of Peter surviving me, per stirpes and not per capita.

Thirteenth. All the rest, residue and remainder of my estate, together with any accretions thereto by reason of any legacies that may have lapsed or by reason of any portion of my estate falling in or being for any reason undisposed of, I give, devise and bequeath as follows:

I direct my Trustees to set aside the sum of Fifty
104 Thousand Dollars ($50,000) in trust to hold, invest, reinvest and manage the same during the lifetime of Bradley Sherman Dresser, a son of my said wife Pauline by a former marriage, if he shall survive me, for and during the period of his life, and to pay over the income thereof to him in equal quarterly payments for and during the period of his life, and upon his death, I give, devise and bequeath the principal of the trust fund to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York at the date of his death.

I direct my Trustees to set aside the sum of Fifty Thousand Dollars ($50,000) in trust, to hold, invest, reinvest and manage the same during the lifetime of Charles R. Dresser, a son of my said wife Pauline by a former marriage, if he shall survive me, for and during the period of his life, and to pay over the income thereof to him in equal quarterly payments for and during the period of his life, and upon his death I give, devise and bequeath the principal of the trust fund to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York at the date of his death.

The balance of my said residuary estate I direct my Trustees to divide into equal shares, and I dispose of the same as follows:

(1)

(a) In case my wife Pauline shall survive me and we
105 shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set

aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal share set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with
106 my wife Pauline shall survive the date of her remarriage, I give, devise and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

(c) In case my wife Pauline shall survive me, but we shall have been divorced or separated by judicial decree, I direct that

upon my death only such portion of the principal of said equal share as shall represent in market value one-fifth thereof shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of my wife Pauline,
107 and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of such one-fifth portion and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

The remaining portions of said equal share as shall represent in market value four-fifths thereof I give, devise and bequeath to the issue of my marriage with my wife Pauline who shall survive me, per stirpes and not per capita, or if no issue of our marriage survive me, then to my other issue surviving me, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive me, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of my death.

(d) In case my wife Pauline shall have died before me leaving issue of our marriage surviving me, I give, devise and bequeath one of said equal shares to the issue of our marriage surviving me, per stirpes and not per capita.

108 (2)

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

In case Millicent shall not survive me, but issue of Millicent (other than Peter) shall survive me, I give, devise and bequeath said equal share to and among the issue of Millicent surviving me (other than Peter), per stirpes and not per capita.

(3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold,
109 invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter.

In case Peter shall not survive me, but issue of Peter shall survive me, I give, devise and bequeath said equal share to and among the issue of Peter surviving me, per stirpes and not per capita.

Fourteenth. During the minority of Peter, my Trustees shall pay over or apply to his use only so much of the net annual income from his trust share or portion as may be appropriate for his suitable maintenance, education and support, and shall accumulate the balance thereof until Peter shall attain the age of 21 years. Upon Peter attaining the age of 21 years, my Trustees shall pay over to him the accumulations of income, if any, and thereafter shall pay to him the net annual income from his share or portion as hereinbefore directed. Dur-
110 ing the minority of Peter, my Trustees may, instead of making personal application of income to his maintenance, education and support, pay such income to the guardian of Peter, in such amounts and at such times as such guardian may in writing request, and my Trustees shall be under no duty to oversee or supervise in any way the use or application by any such guardian of any payments so made, but shall be fully protected by the written receipt of such guardian from accountability or liability to anyone who may now or hereafter be interested in my estate.

Fifteenth. Inasmuch as I have made what I consider adequate provision for my son Henry by article Sixth of this will,

I direct that wheresoever in articles Twelfth and Thirteenth I have given, devised or bequeathed any share or portion or portions of a share to my issue or to my heirs at law or next of kin, such terms, wheresoever or howsoever used in articles Twelfth and Thirteenth, shall not include but shall exclude my son Henry from participation in any such gift, bequest or devise, and the same shall vest in my issue, heirs at law and, or next of kin other than my son Henry as though he had not survived me.

Sixteenth. In case any trust hereby declared in respect to any share or portion or subdivision or part of my property or of any property over which I may be or become en-
111 titled to exercise power or powers of appointment (whether by the will of my father, the late Henry Huttleston Rogers, or otherwise) shall be or shall be determined by decree of a Court having jurisdiction thereof to be invalid, I do hereby give, devise and bequeath the principal of the share, portion, subdivision or part in respect to which such trust shall be, or shall be determined to be invalid, to the person or persons for or during whose life the same was directed to be held in trust, and I direct my Trustees to transfer, assign and pay over the same to such persons accordingly without holding the same in trust.

Seventeenth. I direct that all inheritance, transfer, legacy, succession or similar duties or taxes which shall become payable in respect of any property or interest passing under this my last will and testament or any codicil hereto I may make hereafter, shall be paid out of the capital of my residuary estate.

Eighteenth. I direct that in case any litigation whatever shall arise in respect to this my last will and testament or as to any of its provisions or as to its probate or concerning the trusts hereby created, or any of them, all the costs, disbursements and allowances awarded by the Court to all the parties concerned in such litigation, and also all the costs, disbursements, counsel fees and expenses of every name, nature and description, which may be expended or incurred by the
112 Executors of or the Trustees under this my will in defending or preparing to defend any such legal proceedings, or in taking advice with respect to their rights and duties concerning the same, or with respect to the construction of this my will, or any question growing out of or arising therefrom, shall be charged against and deducted from the amount devised and bequeathed under this my will in trust or otherwise to or for the benefit of the person or persons commencing or assisting in the prosecution of such legal proceed-

ings against the said Executors and Trustees, and shall be considered as so much money paid to such persons or applied to their use, with like effect, in every respect as if the same amount of money or its equivalent had been paid, transferred or conveyed directly to them by my said Executors and Trustees. The statement of the amounts expended or incurred by my Executors or Trustees as aforesaid, shall be accepted as conclusive upon any accounting by them with respect thereto, both as to the reasonableness of any counsel fees paid and as to the correctness of all payments made or incurred.

Nineteenth. As it may be inadvisable or undesirable, by reason of the character of the property or some of it, hereby disposed of, to actually set apart separate shares in respect of each of the trusts hereinabove provided for, I direct and empower my Trustees, if in their judgment it seems desir-
113 able so to do, but they shall not be obliged so to do except in their absolute discretion, to hold the estate or such portion as they may determine, as an undivided whole, and to pay over the income thereof in the proportions above recited, with the same force and effect as though there had been an actual division of my said estate into the different shares hereinbefore provided. The power so given to my Trustees shall not, however, in any way affect or limit the estates devised or bequeathed in any provision of this my will or the vesting of the same, or defer the actual transfer or payment of the same to the respective persons entitled thereto upon the happening of the respective events and at the respective times hereinbefore provided, but in any such case I direct that such payment or transfer be made and that the Trustees shall have the power in their discretion, but shall not be obliged, to hold the remainder of the estate undivided if in their judgment it seems desirable so to do. In paying over or transferring any such portion of my estate, I direct that the same be made in kind, if possible, so as to avoid partition of any real estate or a sale of any personal property, and I authorize and empower my Trustees accordingly to equalize any such distribution by use of any part of my real or personal estate or of the proceeds of any sale or investment or reinvestment thereof; and the judgment of my Trustees in respect of the value of both real and personal property and of any share or portion of my estate shall be final and
114 conclusive and shall not be subject to review by the person or persons entitled to such payment, nor shall my Trustees be accountable therefor.

Twentieth. I hereby authorize and empower my Trustees to receive from my Executors stocks, securities or other prop-

erty in lieu of cash, and it is my desire that my Executors turn over to my Trustees any stocks or securities or other property of which I may die possessed, without converting the same into cash, and that such stocks, securities or other property shall be so received by my Trustees and may be held by them with the same force and effect as though the said stocks and securities had been converted into cash by my Executors, and the cash resulting therefrom turned over to my Trustees.

Twenty-first. It is my desire that in respect of any of the trust estates by this my last will and testament created, my Executors and Trustees shall set aside in the establishment of any or all of the trust estates, and shall retain and hold upon any of the trusts hereby created any stocks or securities or other property which I may leave at the time of my death, and I give my Trustees full discretion in this regard and full power to determine the value or valuation of the same, and they shall not be liable for any error of judgment in making any such division or setting aside or valuation in the creation of any trust fund or by reason of any depreciation of
115 any of the stocks or securities or other property possessed by me at my death, and any valuation set upon any stocks or securities or other property by them shall be conclusive upon all persons claiming to share in my estate.

Twenty-second. I authorize and empower my Trustees, from time to time, in the event of the maturity of the principal of or liquidation of any stocks or securities, that may at any time constitute any of the trust estates herein provided for, or, if in their judgment it seems advisable, in case of the sale of any of the stocks or securities under the power of sale hereinafter set forth, to invest all or any part of the proceeds received, in such securities, shares of stock or other property as they in their discretion may deem advisable, and from time to time to sell the same and in like manner to reinvest the proceeds in their discretion, without limiting them in respect of any such investments or reinvestments to such investments as may by law permitted to be made by trustees, and they shall not be liable or accountable for any error of judgment in making any such investment or reinvestment, or for any depreciation in the value or market price of any shares of stock, securities, or other investments or reinvestments made by them at any time forming a part of any of the trust estates herein created, or for any loss that may be occasioned by reason of any investment or reinvestment made by my said Trustees hereunder.

116 I direct that my Trustees shall not be required to establish any sinking fund for the amortization of any

premium paid on the purchase of any investments or reinvestments of my estate or any part thereof.

Twenty-third. I give my Executors and Trustees full power and authority from time to time to sell or dispose of all or any part of my real or personal estate, or any investment or reinvestment thereof, at public or private sale, and at such price and upon such terms and subject to such conditions as they shall deem best; and on any such sale to make, execute and deliver good and sufficient deeds or instruments of conveyance or transfer to the purchaser or purchasers; and I do further give and grant to my Trustees, their successor or successors, full power and authority to partition, lease and mortgage any and all real or personal property that may at any time constitute any part of my estate or of the trusts hereinbefore created, with further power to renew or extend any mortgage and or to foreclose the same and to purchase any mortgaged property at foreclosure sale, and to hold, lease, manage and dispose of the same.

I authorize and empower my Trustees to become parties to any reorganization of any of the corporations, the stocks or securities of which may at any time constitute any of the trust estates herein provided for, and to participate in such reorganization to the same extent and as fully and
117 completely as I might do, and to receive upon any such reorganization in lieu of stocks or other securities, and to continue to hold in trust, such distribution of property or assets as may be provided by the terms thereof, without accountability therefor on the part of my Trustees.

I give my Executors and Trustees full power and authority to cause any stocks or securities at any time held in trust, to be registered in the name of the nominee or nominees of my Trustees; to exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and to use such portion of the principal of the trust estate as may be necessary therefor, or in the discretion of my Trustees, to sell any such rights. All extraordinary stock dividends and all realized appreciation in the value of stocks, bonds, securities or other property, resulting from the sale or other disposition thereof, shall be considered principal and not income, but ordinary stock dividends paid regularly by a corporation in lieu of, or in addition to regular cash dividends, shall be considered income and not principal, provided, however, that my Trustees' determination as to whether any stock dividend is ordinary or extraordinary, and their determination as to whether any stock dividend should be apportioned or set aside in whole or in part to principal or income, shall be con-

clusive and binding upon all persons now or hereafter interested in the trust estate.

118 Twenty-fourth. I empower the acting Executors or Executor for the time being of this my Will to pay and satisfy, or compromise or compound, any debts owing or claimed to be owing by or from me or my estate, and any liability to which I or my estate may be or may be alleged to be subject, and to accept any composition or any security, real or personal, for any debts owing to me or my estate, and to allow such time for the payment of any such debt or composition (either with or without taking security for the same) as to them shall seem reasonable, and to refer to arbitration and settle all debts, accounts, and controversies which may arise in respect to my estate, and generally to act in relation to the premises in such manner as they shall think expedient, without being liable for any loss occasioned thereby.

Twenty-fifth. I authorize and empower my Executors and/or my Trustees who may from time to time be qualified and acting as such, in their uncontrolled discretion, to appoint one or more associate and/or successor Trustees, who may be individuals and/or corporations and domiciled or located in any other State or in any foreign country, and to transfer, assign and set over to them the whole or any part of the property belonging to my estate, whether held in trust or otherwise, to be held and administered in such foreign jurisdiction by such associate or successor Trustee or Trustees, but

119 upon and in accordance with the terms and provisions of this Will. Any such appointment may be made by the execution by a majority of my Executors and/or Trustees at the date of such appointment qualified and acting as such, of a written instrument executed with the formalities required by law in respect to a deed of real estate, and any such instrument may include the resignation of one or more of the Executors and/or Trustees appointed by this Will and who shall have exercised said power of appointment, and shall become effective in accordance with the terms thereof upon acceptance of the appointment by the associate and/or successor Trustees therein appointed. Thereupon, my estate or the part of it so disposed of shall be transferred, assigned and set over to such associate and/or successor Trustees by such instruments of transfer as may be appropriate, and shall thereafter be held and administered in such other State or such other foreign country as may be specified in the instrument of appointment, but upon the trusts hereby declared, and the functions, duties, and responsibilities of my Executors and/or Trustees theretofore qualified and acting as such shall thereupon

cease and determine insofar as they may resign or renounce the same by such instrument of appointment, and they shall not be or become liable or accountable to any person now or hereafter interested in my estate for the further custody or administration of my estate or the part thereof so transferred, or under any duty or responsibility to supervise the actions of the associate or successor Trustees.

120 Twenty-sixth. I also authorize and empower my Executors and/or my Trustees who may from time to time be qualified and acting as such, in their uncontrolled discretion, to terminate any of the trusts created by this Will and to transfer, assign and pay over the whole or any part of the principal of any share or portion to the beneficiary of such share or portion who may be at the time of such payment entitled to receive payment of the annual income therefrom, and any payment or payments so made shall operate to terminate the trusts hereby created in respect to the share or portion so paid over, and terminate the rights and interests of any person or persons, remaindermen or otherwise thereafter to receive the same or to enjoy the income therefrom, anything in this Will to the contrary notwithstanding; and upon making any such payment or payments my Executors and/or Trustees shall, by the written receipt of the person to whom such payment or payments are so made, be released from further accountability or liability therefor to any person now or hereafter interested in my estate. Any payment or payments may be made upon the determination of the majority of my Executors and/or Trustees at the date of such payment or payments qualified and acting as such.

Twenty-seventh. I appoint my friend Adrian H. Larkin, my friend Albert Stickney and Central Hanover Bank and Trust Company, to be the Executors of and Trustees under this my Last Will and Testament.

121 In the event of any vacancy among my Trustees, for any reason whatsoever, if my then qualified Trustees shall unanimously agree upon a successor Trustee and shall execute such an appointment in writing, duly acknowledged as in the case of deeds for the transfer of real estate in the State of New York, thereupon the said successor shall become a Trustee under this my Last Will and Testament, but if my said Trustees shall within sixty days after a vacancy occurs among my Trustees, fail to unanimously agree upon and appoint a successor Trustee, then any Trustee or any party in interest may make an application to any Judge of the Supreme Court of the State of New York for the designation of a successor Trustee.

It is my desire that at the time of the qualification of any successor Trustee herein named, or at the time of the unanimous selection by my Trustees of a successor or at the time of the appointment by any Judge of the Supreme Court of a successor Trustee, the remaining Trustees shall forthwith give notice to every adult person having any interest in the trusts created by this my Last Will and Testament of such appointment.

I direct that my Executors and Trustees, their successors or successor, shall not nor shall any of them be required to give any bond or other security for the faithful performance of this trust, even though so required by the laws of any State in which I may have property, and notwithstanding the provisions in that regard of the laws of any such State.

122 Wherever in this my Last Will and Testament I have referred to my Executors and/or Trustees, such expression shall be taken to include any successors or successor Executor and/or Trustee.

I direct that any successors or successor Executor and/or Trustee shall be vested with title to all my property with the surviving or continuing Executors and/or Trustees hereunder jointly.

I direct that any successors or successor Executor and/or Trustee shall have all of the rights, powers and authority, discretionary or otherwise, in this my Will given to or conferred upon the Executors and Trustees herein named.

In case any difference of opinion shall at any time arise between my said Executors, or between my said Trustees in regard to any matter pertaining to the discharge of their duties under any of the trusts or powers given herein, the decision of a majority of my said Executors or of my said Trustees shall be binding and conclusive, it being my wish and intention that the acts and proceedings of a majority shall for all the purposes of this my Will be taken as the acts and proceedings of the entire body of Executors or Trustees, except, however, insofar as pertains to the action in respect of the appointment of a successor Trustee, as hereinbefore provided.

In Testimony Whereof, I, Henry H. Rogers, have hereunto set my hand and seal to this my Last Will and Testament, consisting of twenty-five typewritten pages, this 13th

123 day of January, in the year One thousand nine hundred and thirty-four (1934).

HENRY H. ROGERS. [SEAL]

Signed, Sealed, Published and Declared by the above named Testator, Henry H. Rogers, as and for his last Will and Testa-

ment, in the presence of us and of each of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, this 13 day of January, 1934.

ORSON D. MUNN,
Southampton, L. I., N. Y.
DAVID WAGSTAFF,
Tuxedo, New York.
P. L. BEHRENDT,
Southampton, N. Y.

Proved Oct. 28, 1935.
Recorded in Suffolk County Surrogate's Office in Liber of Wills at page—.

STATE OF NEW YORK,
Suffolk County, Surrogate's Court, ss.:

I, John D. Hallock, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the foregoing copy of the Will of Henry H. Rogers, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of the said original record. In testimony whereof, I have hereunto set my hand and affixed the seal of office of said Surrogate, the 1st day of November in the year of our Lord one thousand nine hundred and thirty-five.

[L. S.] JOHN D. HALLOCK,
Clerk of the Surogate's Court.

124 *Exhibit D*

SURROGATE'S COURT, COUNTY OF NEW YORK

DECREE WITH NOTICE OF ENTRY

No File Number

In the Matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company (formerly The Farmers' Loan and Trust Company), Adrian H. Larkin and William R. Coe, as Trustees of the Trust Created for the Benefit of Henry H. Rogers, Jr., under Article Eighth of the Last Will and Testament of Henry H. Rogers, Deceased

SIRS: Please take notice that the within is a true copy of a decree in the above-entitled proceeding, duly made and entered

in the Office of the Clerk of the Surrogate's Court of New York County on the 12th day of January, 1939.

Dated, New York, N. Y., January 13, 1939.

Yours, etc.,

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as Trustees, etc., Petitioners, 15 Broad Street, Borough of Manhattan, City of New York.

To:

SPENCE, HOPKINS, WALSER & HOTCHKISS, Esqs.,
Attorneys for Pauline Hoving,
40 Wall Street, New York, N. Y.

SIMPSON, THATCHER & BARTLETT, Esqs.,
Attorneys for Mary Millicent Balcom,
120 Broadway, New York, N. Y.

STEPHEN P. NASH, Esq.,
Special Guardian for Ramos Infants,
15 Broad Street, New York, N. Y.

125 JOHN CALDWELL MYERS, Esq.,
General Guardian of Peter A. C. M. Salm,
295 Madison Avenue, New York, N. Y.

LARKIN, RATHBONE & PERRY, Esqs.,
Attorneys for Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as Executors and Trustees under the Will of Henry H. Rogers, Jr., deceased.
70 Broadway, New York, N. Y.

SHEARMAN & STERLING, Esqs.,
Attorneys for City Bank Farmers Trust Company, as Executor of the Estate of John W. Sterling, deceased.
55 Wall Street, New York, N. Y.

WHITE & CASE, Esqs.,
Attorneys for The New York Trust Company,
14 Wall Street, New York, N. Y.

COUDERT BROTHERS, Esqs.,
Attorneys for Massachusetts Bonding & Insurance Company,
2 Rector Street, New York, N. Y.

SAGE, GRAY, TODD & SIMMS, Esqs.,
Appearing Personally,
40 Wall Street, New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH, Esqs.,
Appearing Personally,
20 Exchange Place, New York, N. Y.

JEROME M. HERSCH, Esq.,
Attorney for State Tax Commissioner,
80 Centre Street, New York, N. Y.

TIMOTHY J. HEALY, Esq.,
Attorney for Henry Huddleston Rogers, Jr.,
521 Fifth Avenue, New York, N. Y.

126 At a Surrogate's Court held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County, and State of New York, on the 12th day of January 1939.

Present: Honorable JAMES A. FOLEY, Surrogate.

DECREE SETTLING ACCOUNT OF TRUSTEES

No. File Number

In the Matter of THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF PROCEEDINGS OF CITY BANK FARMERS TRUST COMPANY (FORMERLY, THE FARMERS' LOAN AND TRUST COMPANY), ADRIAN H. LARKIN AND WILLIAM R. COE, AS TRUSTEES OF THE TRUST CREATED FOR THE BENEFIT OF HENRY H. ROGERS, JR., UNDER ARTICLE EIGHT OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED

City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe having filed in this Court a verified petition praying that their account of proceedings as trustees of the trust created for the benefit of Henry H. Rogers, Jr., under Article Eighth of the last will and testament of Henry H. Rogers, late of the County of New York, deceased, be judicially settled and allowed and that the Court determine the validity, construction and effect of the provisions of the Will of said Henry H. Rogers, Jr., deceased, insofar as they affect the distribution of said trust fund and particularly the provisions by which said Henry H. Rogers, Jr. exercised the power of appointment granted him under the Will of Henry H. Rogers, deceased, and

further that the Court determine the persons entitled to receive the distribution of the principal and income of said trust fund now in the hands of said trustees and the respective rights and interests of such persons therein;

And a citation having been issued thereon directed to all persons interested or claiming to be interested in said trust fund or required to be cited by law, citing them and each of them to show cause before the Surrogate's Court of New York County held at the Hall of Records in the County of New York, on the 28th day of September 1937, at half past ten o'clock in the forenoon of that day why said account should not be judicially settled and why said will should not be construed and a determination had of the persons entitled to receive distribution of said trust fund as prayed for in said petition, and said citation having been returned with proof of due service thereof on Mary Millicent Balcom (also known as Millicent Rogers Balcom), Peter Alfred Constantin Maria Salm, Arturo Henry Peralta Ramos, Paul Jaime Peralta Ramos,
Henry Huddleston Rogers, Jr., Adrian H. Larkin, as
127 executor of and trustee under the last will and testament of Henry H. Rogers, Jr., deceased, Albert Stickney, as executor of and trustee under the last will and testament of Henry H. Rogers, Jr., deceased, Central Hanover Bank and Trust Company as executor of and trustee under the last will and testament of Henry H. Rogers, Jr. deceased, City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, The New York Trust Company, and Massachusetts Bonding and Insurance Company;

And a supplemental citation having been issued herein directed to Henry Huddleston Rogers, Jr. citing him to show cause before the said Surrogate's Court to be held at the Hall of Records in the County of New York on the 5th day of November 1937, at half past ten o'clock in the forenoon of that day why the said account should not be so judicially settled and why the said will should not be so construed and a determination had of the persons entitled to receive distribution of said trust fund as prayed for in said petition, and the said supplemental citation having been returned with proof of due service thereof on said Henry Huddleston Rogers, Jr.;

And Pauline Hoving, the law partnership of Messrs. Sage, Gray, Todd & Sims, the State Tax Commission and the law partnership of Messrs. Mitchell, Taylor, Capron & Marsh having appeared herein either personally or by authorized notices of appearance duly acknowledged and filed herein:

And the matter having come on to be heard before this Court on the return day of said citation and having been adjourned

to the return day of said supplemental citation, and the petitioners having appeared herein by their attorneys, Messrs. Davis Polk Wardwell Gardiner & Reed, and having rendered, under oath, before the said Surrogate their account of proceedings as trustees of the trust created for the benefit of Henry H. Rogers, Jr. under Article Eighth of the last will and testament of Henry H. Rogers, deceased, to the 30th day of January 1937, and said account having been filed and the said petitioners thereafter having rendered, under oath, a supplemental account of their proceedings as such trustees, to the 6th day of October 1937, and a second supplemental account of their said proceedings to the 3rd day of November 1938, and a supplemental affidavit of Samuel R. Walker sworn to the 3rd day of January 1939, which said supplemental accounts and affidavit having been duly served upon all parties to this proceeding and filed herein, and the issuance of a supplemental citation having been waived by all parties, subject to the approval of the Surrogate as to the infant parties to this proceeding;

And the several respondents in this proceeding having appeared by counsel herein, as follows: Pauline Hoving, by her attorneys, Messrs. Spence, Hopkins, Walser & Hotchkiss; Mary Millicent Balcom (also known as Millicent Rogers Balcom), by her attorneys, Messrs. Simpson, Thacher & Bartlett; Henry Huddleston Rogers, Jr., by his attorney, Timothy J. Healy, Esq.; Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, by their attorneys, Messrs. Larkin, Rathbone & Perry; City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, deceased, by its attorneys, Messrs. Shearman & Sterling; The New York Trust Company, by its attorneys, Messrs. White & Case, and Massachusetts Bonding and Insurance Company, by its attorneys, Messrs. Coudert Bros.; and Messrs. Sage, Gray, Todd & Sims, and Messrs. Mitchell, Taylor, Capron & Marsh having appeared herein, respectively, in person; and the State Tax Commission having appeared herein by its attorney Edgar A. Hirschberg, Esq., for whom was substituted subsequently Jerome M. Hirsch, Esq.;

128 And Stephen P. Nash, Esq., having been appointed as special guardian for the infant respondents Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos and having duly qualified as such special guardian; and John Caldwell Myers, Esq., co-general guardian of Peter Alfred Constantin Maria Salm, an infant respondent, having appeared herein on behalf of his ward;

And respondent City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, a deceased trustee of said trust fund, having filed an answer herein, verified November 17, 1937, praying that Section 2 of the account of proceedings dated July 5, 1918, and filed herein be judicially settled and allowed as the account of proceedings of John W. Sterling, deceased, as a trustee of said trust fund; and there being no objections on the part of any party to the relief prayed for in said answer;

And respondent Mary Millicent Balcom (also known as Millicent Rogers Balcom) having filed an answer and objections herein, verified November 19, 1937, objecting to the commissions claimed by the accounting trustees and to the attorneys' fees paid by them, and said objection to the attorneys' fees, being objection numbered 2 of said objections, having been withdrawn by stipulation of counsel for the accounting trustees and for said respondent dated May 24, 1938, and filed herein, and the commissions of said accounting trustees being adjusted and allowed, as hereinafter determined in this decree;

And respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, having filed an answer herein, verified November 19, 1937, contending that the power of appointment granted said Henry H. Rogers, Jr., under the will of Henry H. Rogers, deceased, of the trust fund herein accounted for was validly exercised by the last will and testament of said Henry H. Rogers, Jr., deceased, but invoking the equitable doctrine of marshalling, in the event that it should be determined that the appointment in further trusts contained in said will of Henry H. Rogers, Jr., deceased, of the funds herein accounted for is to any extent invalid to the end that the entire appointed fund should be paid to the respondents as trustees under the last will and testament of said Henry H. Rogers, Jr., deceased, and further praying that provision be made in the decree to be entered herein for payment out of the trust fund accounted for of its proportionate share of any New York and Federal Estate taxes, of certain amounts assigned to said respondents by Pauline Hoving, and of all accrued income of said trust fund to the date of death of said Henry H. Rogers, Jr., the life beneficiary of said trust fund;

And said Stephen P. Nash, Esq., special guardian for the infant respondents herein, Arturo Henry Peralta Ramos and Paul Jaime Peralfa Ramos, having filed herein his report dated May 27, 1938, and his supplemental report dated Janu-

ary 9, 1939, and an answer contending that the power of appointment granted said Henry H. Rogers, Jr., under the will of Henry H. Rogers, deceased, of the trust fund herein accounted for was validly exercised by the last will and testament of said Henry H. Rogers, Jr., deceased, but invoking the equitable doctrine of marshalling, in the event that it should be determined that the appointment in further trusts, contained in said will of Henry H. Rogers, Jr., deceased of the funds herein accounted for is to any extent invalid, and said special guardian also having filed objections to said account, verified the
129 2nd day of June 1938, claiming that certain amounts received by said trustees were improperly credited to principal and said trust fund instead of to income, and that certain amounts paid out by said trustees were improperly paid from income instead of from principal, raising certain questions as to the propriety of the making or retention of certain investments on the part of the accounting trustees and requesting a determination as to whether the provisions of Article Second of the last will and testament of Henry H. Rogers, deceased, created a trust, an annuity or a charge upon the residuary estate of said deceased in favor of his widow Emilie R. Rogers, deceased;

And said John Caldwell Myers, Esq., having filed a general guardian's answer herein on behalf of his ward Peter Alfred Constantin Maria Salm, an infant, and also having filed herein his report dated January 4, 1939, approving said account and supplemental accounts and affidavit filed herein;

And respondent Henry Huddleston Rogers, Jr., having filed an answer herein, verified November 11, 1937, under the name of Henry H. Rogers, asking a determination that said Henry H. Rogers, Jr., did not validly exercise the power of appointment granted him under the last will and testament of said Henry H. Rogers, deceased, and that the trust fund herein accounted for passes under the provisions of Article Eighth of the last will and testament of said Henry H. Rogers, deceased, to said Pauline Hoving, Henry Huddleston Rogers, Jr., and Mary Millicent Balcom as the only heirs at law of Henry H. Rogers, Jr., deceased, as in the case of the inheritance of real property according to the laws of the State of New York;

And replies to said answer of Henry Huddleston Rogers, Jr. having been filed herein as follows: By the petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, verified by said trustees, respectively, on November 30, 1937, November 24, 1937, and December 6, 1937, submitting the issues raised by said answer to the determination of this Court; by respondents Central

Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, verified November 29, 1937, praying that said answer be dismissed; by respondent Mary Millicent Balcom (named in said reply as Millicent Rogers Balcom) verified November 26, 1937, praying that the exercise of the power of appointment contained in the will of said Henry H. Rogers, Jr., deceased, be held valid and that the equitable doctrine of marshalling be invoked, if necessary, to carry out the provisions of said will; and by respondent Pauline Hoving, verified November 30, 1937, praying that said answer of Henry Huddleston Rogers, Jr., be dismissed;

And said respondent Pauline Hoving having moved this Court on an affidavit sworn to by her on March 24, 1938, by order to show cause dated March 25, 1938, and returnable March 29, 1938, for an order dismissing said answer and objections of said respondent Henry Huddleston Rogers, Jr., and said motion having duly come on to be heard before the Surrogate, and the Surrogate having heard arguments of counsel and having read the papers submitted in support of and opposed to said motion; and having made and filed his decision in writing dated May 23, 1938, and an order having been duly made and entered herein dated May 27, 1938, striking out the entire answer and all objections of said respondent
130 Henry Huddleston Rogers, Jr. and said Henry Huddleston Rogers, Jr. having taken an appeal to the Appellate Division, First Department of the Supreme Court of the State of New York, from said order and said appeal having been dismissed by order of said Appellate Division, First Department, duly made and entered dated October 7, 1938;

And certain of the parties to this proceeding, to wit, the petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, Peter Alfred Constantin Maria Salm, Arturo Henry Peralta Ramos, Paul Jaime Peralta Ramos, Mary Millicent Balcom (also known as Millicent Rogers Balcom) and Pauline Hoving having agreed to compromise and settle certain of the issues and controversies between them as raised by the pleadings filed herein subject to the approval of this Court and a written agreement of compromise dated July 27, 1938 having been entered into by and between the adult and corporate parties

above named, compromising and settling said issues and controversies, and said agreement having been submitted to the Surrogate together with a petition of the accounting trustees, to wit, City Bank Farmers Trust Company, Adrian H. Larkin, and William R. Coe, verified by said trustees, respectively, on September 6, 1938, August 31, 1938, and October 13, 1938, praying that the Court ratify and approve said compromise agreement and authorize its execution by a special guardian or guardians on behalf of all the infant parties thereof, and also on behalf of persons unknown who, and persons not in being who, if and when born, will constitute heirs at law and next of kin of said Henry H. Rogers, deceased, under the laws of the State of New York in force upon the date of death of said Peter Alfred Constantin Maria Salm; and the Surrogate having extended the appointment of said Stephen P. Nash, Esq. as special guardian, to include the said persons unknown and unborn, and said Stephen P. Nash, Esq., having filed a report herein dated November 3, 1938, approving the said compromise agreement, and said John Caldwell Myers, Esq. as general guardian of said Peter Alfred Constantin Maria Salm having filed a report herein dated October 27, 1938, also approving the said compromise agreement, and the Surrogate having made and filed his decision in writing dated November 7, 1938, and an order having been duly made and entered herein dated November 9, 1938, approving said compromise agreement and authorizing and directing said Stephen P. Nash, Esq. and John Caldwell Myers, Esq. to enter into and execute the said compromise agreement on behalf of their respective wards; and the said compromise agreement dated July 27, 1938, having been duly signed, acknowledged and delivered by said special guardian and general guardian on behalf of their respective wards and having been filed herein;

And the matters remaining in dispute in this proceeding after the dismissal of the answer and objections of said Henry Huddleston Rogers, Jr. and the approval and execution of said compromise agreement dated July 27, 1938, having duly come on to be heard before the Surrogate on November 3, 1938; and Messrs. Davis, Polk, Wardwell, Gardiner & Reed, having appeared on behalf of petitioners City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees of said trust fund, and John Caldwell Myers, Esq., co-general guardian of Peter Alfred Constantin Maria Salm, having appeared on behalf of his said ward, and Stephen P. Nash, Esq., special guardian of Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos, having appeared on behalf of

his said wards, and Messrs. Spence, Hopkins, Walser &
131 Hotchkiss having appeared on behalf of respondent Pauline Hoving and Messrs. Simpson; Thacher & Bartlett having appeared on behalf of respondent Mary Millicent Balcom, and Messrs. Larkin, Rathbone & Perry having appeared on behalf of respondents, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of and trustees under the last will and testament of Henry H. Rogers, Jr. deceased, and Messrs. White & Case having appeared on behalf of respondent The New York Trust Company and Messrs. Shearman & Sterling having appeared on behalf of respondent City Bank Farmers Trust Company, as sole surviving executor of the estate of John W. Sterling, deceased trustee under the will of Henry H. Rogers, deceased; and the Surrogate having heard the proofs and arguments of counsel and having made and filed herein his decision in writing dated November 7, 1938, and his further decision in writing dated December 6, 1938;

And it appearing that said Henry H. Rogers died on May 19, 1909, a resident of the County and State of New York leaving a last will and testament dated May 7, 1907, which was duly admitted to probate in the Surrogate's Court of New York County on May 28, 1909, and that in and by Article Eighth of said will he divided his residuary estate into equal shares for his surviving children and that he provided in part with respect to the said shares as follows:

"IV. To apply the income of each share, set apart for the benefit of any child of mine, who shall not have attained the age of forty years, at the time of my death, to the use of such child, until he shall attain the age of forty years, and thereupon to convey, transfer and pay over to the said child one-half of the principal of the share set apart for the said child as aforesaid, and to apply the income of the remaining half of each such share to the use of the said child during his or her life; and, upon the death of the said child, to convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York."

And it further appearing that said Henry H. Rogers left him surviving four children, of which Henry H. Rogers, Jr. was one, and that said Henry H. Rogers, Jr. was under the age of forty years at the time of the death of said Henry H. Rogers,

and that a trust fund was duly constituted and set up for the benefit of said Henry H. Rogers, Jr. in accordance with the provisions of said will and that the duly appointed and presently acting trustees of said trust fund are the petitioners and accounting parties herein, to wit: City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, and that said trust fund is the trust fund herein accounted for;

And it further appearing that thereafter said Henry H. Rogers Jr. life beneficiary of said trust fund, attained the age of forty years on December 28, 1919, and thereupon received the one-half share of said trust fund directed to be paid to him upon attaining said age, except as to the sum of $17,914.74 which should now be paid to the executors of his estate, and that thereafter said Henry H. Rogers, Jr. died on July 25, 1935, a resident of the County of Suffolk, State of New York, leaving a last will and testament dated Jan. 13, 1934, which was duly admitted to probate by the Surrogate's Court of Suffolk
132 County on October 28, 1935, and that respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney are the duly appointed and acting executors of and trustees under said will, and that in and by said will said Henry H. Rogers, Jr. purported to exercise the power of appointment granted him under the last will and testament of his father, the said Henry H. Rogers, deceased, and providing in part as follows:

"Twelfth: I hereby exercise the power or powers of disposition and appointment given to me by the will of my said father, the late Henry Huttleston Rogers, and dispose of the property subject thereto as follows:

I direct that said property be divided by my Trustees into equal shares; and

(1)

(a) In case my wife Pauline shall survive me and we shall not have been divorced or separated by judicial decree, I direct that one of said equal shares shall be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during her life and to pay over the net annual income to her in as near as may be quarterly payments in each year, and upon her death I give, devise and bequeath the principal of the trust share and any accrued income to the issue of our marriage her surviving, per stirpes and not per capita, or if no issue of our marriage survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive her, then to my heirs

at law and next of kin, except Henry, entitled to inherit the same under the laws of New York at the date of her death.

(b) In the event that my wife Pauline shall survive me, and we shall not have been divorced or separated by judicial decree, and my wife Pauline shall after my death remarry, I direct that the trust in respect of such portion of the principal of the equal shares set aside in trust for her as shall represent in market value one-half thereof shall terminate upon the remarriage of my wife Pauline, and as to such one-half of the trust estate I give, devise and bequeath the same to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with my wife Pauline shall survive the date of her remarriage, I give, devise and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of such remarriage.

Upon the death of my wife Pauline, she having remarried, I give, devise and bequeath the remaining portion of said share held in trust for her to the issue of my marriage with my wife Pauline her surviving, per stirpes and not per capita, or in case no issue of our marriage shall survive her, then to my other issue surviving her, except Henry, per stirpes and not per capita, or in case no such other issue of mine, except Henry, shall survive her, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of her death.

* * * * *

In case Millicent shall survive me, I direct that one of said equal shares be set aside by my trustees in trust, to hold,
133 invest, reinvest and manage the same during the life of Millicent, and to pay over the net annual income thereof to her in as near as may be equal quarterly payments in each year. Upon the death of Millicent, leaving issue (other than Peter) surviving her, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to such surviving issue of Millicent (other than Peter), per stirpes and not per capita. In case Millicent, having survived me, shall have died leaving no issue (other

than Peter) surviving her, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Millicent.

* * * * * *

(3)

In case Peter shall survive me, I direct that one of said equal shares be set aside by my Trustees in trust, to hold, invest, reinvest and manage the same during the life of Peter, and to pay over the net annual income thereof to him in as near as may be equal quarterly payments in each year. Upon the death of Peter, leaving issue surviving him, I give, devise and bequeath the principal of the trust share, together with any accrued and unpaid income, to the surviving issue of Peter, per stirpes and not per capita. In case Peter, having survived me, shall have died leaving no issue surviving him, I give, devise and bequeath said trust share to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New York in force upon the date of the death of Peter."

And it further appearing that said Henry H. Rogers, Jr., left him surviving his said widow Pauline Rogers who later remarried on April 30, 1937, and is now known as Pauline Hoving, his said daughter Mary Millicent Balcom, and his said grandson Peter Alfred Constantin Maria Salm; all of whom are now living and that said Mary Millicent Balcom had then living two other children, to wit, Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos, both of whom are now living, and no other issue and that said Peter Alfred Constantin Maria Salm had then and has now no issue and that there was no issue of the marriage of said Henry H. Rogers, Jr., and Pauline Rogers Hoving and that said Pauline Rogers Hoving and said Mary Millicent Balcom were in being on May 19, 1909, the date of death of said Henry H. Rogers, but that said Peter Alfred Constantin Maria Salm was not in being on said date;

And it further appearing that under Articles Second and Fifth of the will of the said Henry H. Rogers, deceased, certain trust funds were created for the lives of certain beneficiaries named therein and that upon the death of said beneficiaries the remainders of said trust funds became or will become part of the residuary estate of said Henry H. Rogers, deceased, and one-fourth thereof added to the said trust fund for Henry H. Rogers, Jr. under said will being the trust fund herein accounted for, and that of the trust funds now in the hands of the accounting trustees 6.667% represents property which previously constituted part of the said trust funds under Articles Second and

Fifth of said will which already had been held in trust for two lives up to the date of death of said Henry H. Rogers, Jr. and cannot validly be held in any further trust under the exercise of the power of apointment contained in the will of said Henry H. Rogers, Jr. deceased; and it further appearing that the trust funds created under said Articles Second and Fifth of
134 said will of Henry H. Rogers, deceased, for the benefit of Marion Rogers, now Marion R. Vincent and Rowland Rogers have been separately constituted and set aside and that said life beneficiaries are still living and that said trust funds will become distributable and be accounted for only upon the deaths of the respectve life beneficiaries thereof;

And it further appearing that the respondent Pauline Hoving has made certain assignments of her interest in the trust fund herein accounted for as follows:

To The New York Trust Company by assignment dated March 17, 1936, to secure repayment to it of the sum of $50,000;

To the executors of the estate of Henry H. Rogers, Jr., deceased, by assignment dated June 3, 1936, to secure repayment to them of sums totalling $10,000;

To the executors of the estate of Henry H. Rogers, Jr., deceased, by assignment dated August 12, 1936, to secure repayment to them of sums totalling $20,000;

To Messrs. Sage, Gray, Todd & Sims by assignments dated April 16, 1936, and October 6, 1937, respectively, to secure repayment to them of the sum of $15,114.95;

To Massachusetts Bonding and Insurance Company by assignment dated December 15, 1936, to secure repayment to the executors of the estate of Henry H. Rogers, Jr., deceased, of sums totalling $30,000;

To Massachusetts Bonding and Insurance Company by assignment dated June 18, 1937, to secure repayment to the executors of the estate of Henry H. Rogers, Jr., deceased, of sums totalling $10,000;

To Messrs. Mitchell, Taylor, Capron & Marsh by assignment dated April 29, 1938, to secure repayment to them of the sum of $44,553.82;

To Oswald W. Knauth by assignment dated August 31, 1938, to secure repayment to him of the sum of $10,562.53; and that said Pauline Hoving has consented that the amounts due under said assignments together with interest thereon where provided for shall be paid from the principal and income of said trust fund due her under this decree and that such provision for such repayment should be made herein;

Now, therefore, it is hereby ordered, adjudged, and decreed as follows:

1. That Henry Huddleston Rogers, Jr., has no interest in the trust fund herein accounted for and that the order dismissing his answer and objections dated May 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

2. That the compromise agreement dated July 27, 1938, compromising and settling certain issues in this proceeding and the order approving the same dated November 9, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

3. That the withdrawal of the contentions of Stephen P. Nash, Esq., special guardian of Arturo Henry Peralta
135 Ramos and Paul Jaime Peralta Ramos and of the executors of the estate of Henry H. Rogers, Jr., deceased, that the doctrine of marshalling should be applied as between the funds comprising the trust herein provided for and the funds comprising the individual estate of Henry H. Rogers, Jr., in order to carry out fully the appointment contained in the will of Henry H. Rogers, Jr., deceased, of the funds herein accounted for in further trust, which said withdrawal is made pursuant to the provisions of said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

4. That the contention of said Stephen P. Nash Esq., as such special guardian, and of the executors of the estate of Henry H. Rogers, Jr., deceased, that the doctrine of marshalling should be applied within the trust fund herein accounted for as between the funds appointed in further trust under the appointment contained in the will of said Henry H. Rogers, Jr., deceased; and the funds which are payable or distributable outright be and the same hereby is overruled and dismissed.

5. That the withdrawal of the objections of said Stephen P. Nash, Esq., as such special guardian, to the account of the trustees numbered 1, 2, 3, 4, 5, and 8, pursuant to the said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

6. That the objection, numbered 6, of said Stephen P. Nash, Esq., as such special guardian, to the account of the trustees be and the same hereby is sustained upon consent of all parties, and that the account of the trustees be and the same hereby is adjusted by crediting to income and charging against principal one-fourth of the sum of $10,738.26, representing expenses of the Yacht Kanawha, to wit, the sum of $2,684.57, which were erroneously charged against income in Section 7, Exhibit K, Schedule C–II, Part IV (page 1092) of the account filed herein.

7. That the objection of said Stephen P. Nash, Esq., as such special guardian, to the account of said trustees numbered 7 be and the same hereby is overruled and dismissed.

8. That the withdrawal of the contention of respondents Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of and trustees under the last will and testament of Henry H. Rogers, Jr., deceased, that the share of Peter Alfred Constantin Maria Salm in the trust fund herein accounted for should be paid to and held by them as trustees pursuant to the provisions of Article Fourteenth of the last will and testament of said Henry H. Rogers, Jr., deceased, which withdrawal is made pursuant to the provisions of said compromise agreement of July 27, 1938, be and the same hereby is in all respects ratified, approved and confirmed.

9. That by Article Twelfth of his last will and testament, said Henry H. Rogers, Jr., validly exercised the power of appointment of the trust fund herein accounted for which was granted him by the last will and testament of Henry H. Rogers, deceased, except as to 6.667% of said fund representing property which already had been held in trust for two lives at the time of the death of said Henry H. Rogers, Jr., and as to the share of said trust fund appointed in further trusts for Peter Alfred Constantin Maria Salm, who was not in being at the time of the death of said Henry H. Rogers, deceased.

136 10. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Pauline Hoving by the will of Henry H. Rogers, Jr., deceased, should be paid to her or her assignees outright under the alternative appointment contained in Article Sixteenth of the said will of said Henry H. Rogers, Jr., deceased.

11. That one-half of the balance of said one-third share of principal of said trust fund appointed for the benefit of said Pauline Hoving under said will of said Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to said Pauline Hoving, or her assignees, should be paid outright to said Mary Millicent Balcom by reason of the remarriage of said Pauline Hoving, pursuant to the provisions of Article Twelfth of said will.

12. That the remaining one-half of the balance of said one-third share of principal of said trust fund so appointed for the benefit of said Pauline Hoving under said will of said Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to said Pauline Hoving, or her assignees, should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees under Article Twelfth

of said last will and testament of Henry H. Rogers, Jr., deceased, to be held in trust by them upon the terms and conditions set forth in said Article Twelfth of said will, for the benefit of said Pauline Hoving.

13. That the income on said one-third share of principal of said trust fund so appointed for the benefit of Pauline Hoving should be distributed pursuant to the provisions of Articles Twelfth and Sixteenth of said last will and testament of Henry H. Rogers, Jr., deceased, as follows: (1) to said Pauline Hoving, (a) all income thereof accrued to April 30, 1937, the date of her remarriage, (b) 6.667% of all income thereof accrued subsequently to said date of remarriage, (c) one-half of the balance of said income accrued subsequently to said date of remarriage, (2) to Mary Millicent Balcom the other one-half of the balance of said income accrued subsequently to said date of remarriage.

14. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of Mary Millicent Balcom by the will of Henry H. Rogers, Jr., deceased, should be paid to her outright under the alternative appointment contained in Article Sixteenth of the will of said Henry H. Rogers, Jr., deceased.

15. That the balance of said one-third share of principal of said trust fund appointed for the benefit of said Mary Millicent Balcom under said will of Henry H. Rogers, Jr., remaining after payment of said 6.667% thereof to said Mary Millicent Balcom, should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees for the benefit of said Mary Millicent Balcom under the provisions of Article Twelfth of the said last will and testament of said Henry H. Rogers, Jr., deceased.

16. That the entire income of said one-third share of principal of said trust fund appointed for the benefit of said Mary Millicent Balcom under the will of said Henry H. Rogers, Jr., deceased, should be paid to her under the provisions of Articles Twelfth and Sixteenth of the last will and testament of said Henry H. Rogers, Jr., deceased.

137 17. That 6.667% of the one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of Peter Alfred Constantin Maria Salm by the will of Henry H. Rogers, Jr., deceased, should be paid to said Mary Millicent Balcom and John Caldwell Myers as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm, an infant, under the alternative appointment

contained in Article Sixteenth of the last will and testament of said Henry H. Rogers, Jr., deceased.

18. That out of the balance of said one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Peter Alfred Constantin Maria Salm under said will of Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to his co-general guardians, the sum of $500,000 should be paid to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees under Article Thirteenth, subdivision 3 of the last will and testament of Henry H. Rogers, Jr., deceased, to be held in trust by them upon the terms and conditions set forth in said Article with all of the powers and authority granted said trustees under said will and set forth in the compromise agreement of July 27, 1938, said payment being made pursuant to the provisions of the said compromise agreement of July 27, 1938.

19. That the balance of principal of said one-third share of principal of said trust fund purported to be appointed in further trust for the benefit of said Peter Alfred Constantin Maria Salm under said will of Henry H. Rogers, Jr., deceased, remaining after payment of said 6.667% thereof to his co-general guardians and after payment of said $500,000 to the said trustees under the will of said Henry H. Rogers, Jr., deceased, should be paid to said Mary Millicent Balcom and John Caldwell Myers, as co-general guardians of said Peter Alfred Constantin Maria Salm under the alternative appointment contained in Article Sixteenth of the said will of said Henry H. Rogers, Jr., deceased, and pursuant to the provisions of said compromise agreement of July 27, 1938.

20. That the entire income of said one-third share of principal of said trust fund appointed for the benefit of Peter Alfred Constantin Maria Salm under the will of said Henry H. Rogers, Jr., deceased, should be paid outright to said Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm pursuant to the provisions of said compromise agreement of July 27, 1938.

And the said Surrogate having examined said account, supplemental accounts and supplemental affidavit and having adjusted the same now here finds the state and condition of said account to be as stated in the following summary statement thereof made by the Surrogate as judicially settled and adjusted by him to be recorded with and taken to be a part of the decree in this matter, to wit:

138 SUMMARY STATEMENT OF THE ACCOUNT OF PROCEEDINGS OF CITY BANK FARMERS TRUST COMPANY, ADRIAN H. LARKIN AND WILLIAM R. COE, AS TRUSTEES OF THE TRUST CREATED FOR THE BENEFIT OF HENRY H. ROGERS, JR. UNDER ARTICLE EIGHTH OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED.

For the period from the Inception of said trust to July 5, 1918

The Trustees are charged:		
1—As to Principal		
With Receipts, as per Schedule 'A' I hereof	$5,835,270.67	
With Increase, as per Schedule 'A' II hereof	12,139.42	
With Receipts as per Schedule 'A' III hereof	2,351.23	
	$5,849,761.32	
Less: Decrease, as per Schedule 'B' hereof	37,729.20	$5,812,032.12
2—As to Income		
With Receipts, as per Schedule 'A' IV hereof	$1,310,853.54	
With Receipts, as per Schedule 'A' V hereof	122,051.77	
With Receipts for the individual account of Henry H. Rogers, as per Schedule 'A' VI hereof	15,027.79	1,447,936.10
Total charge		$7,259,968.22
The Trustees are credited:		
1—As to Principal:		
With Payments as per Schedule 'C' I hereof		$ 74.65
139 2—As to Income:		
With Payments, as per Schedule 'C' II Part 1 hereof	$ 3,661.67	
With Payments, as per Schedule 'C' II Part 2 hereof	25,112.44	
With Payments for accrued interest as per Schedule 'D' hereof	8,721.35	
With Payments to Henry H. Rogers as per Schedule 'E' hereof	1,257,382.77	1,294,878.23
Total credit		$1,294,952.88
Total charge as above		$7,259,968.22
Total credit as above		1,294,952.88
Leaving balance of Trust Fund on hand July 5, 1918:		
Of Principal, as per Statement annexed	$5,811,957.47	
Of Income, as per Statement annexed	153,057.87	$5,965,015.34

Consisting of:		
Stocks and Securities held as Investments of Principal, as per Schedule 'G' III hereof	$5,813,087.80	
Stocks and Securities received as Dividends upon Investments of the Trust and which are regarded as Income, deliverable to the Beneficiary, as per Schedule 'G' IV hereof	80,126.00	
Cash	71,801.54	
	$5,965,015.34	

For the period from July 5, 1918, to December 31, 1922

The Trustees are charged:

1—As to Principal:			
With balance on hand, as per Trustees' former account dated July 5, 1918		$5,811,957.47	
With receipts, as per Schedule 'A' II hereof		8,147,369.99	
With increase, as per Schedule 'A' III hereof	$4,531,657.19		
Less: Decrease as per Schedule 'B' hereof	581,550.09	3,950,107.10	$17,909,434.56
2—As to income:			
With balance on hand, as per Trustees' former Account, dated July 5, 1918		$153,057.87	
With receipts, as per Schedule 'A' V hereof		1,745,155.75	
With receipts, as per Schedule 'A' VI hereof		497,418.48	
With receipts, as per Schedule 'A' VII hereof		59,012.05	
			2,454,644.15
Total charge			$20,364,078.71

The trustees are credited:

1—As to Principal:			
With payments, as per Schedule 'C' I Part 1 hereof		$2,391.04	
With payments, as per Schedule 'C' I Part 2 hereof		224,245.30	
With payments, as per Schedule 'E' I hereof		8,793,854.32	$9,020,490.66
2—As to Income:			
With payments, as per Schedule 'C' II Part 1 hereof		$622.70	
With payments, as per Schedule 'C' II Part 2 hereof		45,550.99	
With payments, as per Schedule 'C' II Part 3 hereof		80,404.84	
With payments, as per Schedule 'D' hereof		19,242.53	
With payments, as per Schedule 'E' II hereof		1,793,626.54	
			1,939,447.60
Total credits			10,959,938.26

Total charge as above		$20,364,078 71
Total credit as above		10,959,038 26
Leaving balance of Trust Fund on hand December 31, 1932:		
Of Principal, as per statement annexed	$8,888,943 90	
Of Income, as per statement annexed	515,196 55	
		$9,404,140 45
141 Consisting of:		
Stocks and securities held as Investments of Principal, as per Schedule 'G' IV hereof	$7,966,488 94	
Cash	1,438,051 51	
	$9,404,140 45	

For the Period from December 31, 1922, to September 8, 1924

The trustees are charged:		
1—As to Principal:		
With balance on hand, as per Trustees' former Account, dated December 31, 1922	$8,888,943 90	
With receipts as per Schedule 'A' II hereof	188,000 00	
With receipts, as per Schedule 'A' III hereof	8,457 13	
With Increase, as per Schedule 'A' IV hereof $24,741 76		
Less: Decrease, as per Schedule 'B' hereof 3,151 21	21,590 55	
		$9,106,991 58
2—As to Income:		
With balance on hand, as per Trustees' former Account, dated December 31, 1922	$515,196 55	
With receipts, as per Schedule 'A' V hereof	1,049,056 28	
		1,564,252 83
Total charge		$10,671,244 41
The trustees are credited:		
1—As to Principal:		
With payments, as per Schedule 'C' I Part 1 hereof	$197,015 24	
With payments, as per Schedule 'C' I Part 2 hereof	36,000 00	
With payments, as per Schedule 'E' I hereof	161,500 49	
		394,515 73
2—As to Income:		
With payments, as per Schedule 'C' II Part 1 hereof	$501 66	

142	With payments, as per Schedule 'C' II Part 2 hereof	$43,948.46	
	With payments, as per Schedule 'D' hereof	15,829.53	
	With payments, as per Schedule 'E' II hereof	1,455,430.71	$1,515,705.36
	Total credit		$1,910,221.09
	Total charge as above		$10,671,244.41
	Total credit as above		1,910,221.09
	Leaving balance of Trust Fund on hand September 8, 1924—		
	Of Principal, as per Statement annexed	$8,712,475.85	
	Of Income, as per Statement annexed	48,547.47	$8,761,023.32
	Consisting of:—		
	Stocks and Securities held as Investments of Principal, as per Schedule 'G' III hereof	$8,681,261.33	
	Cash	79,761.99	
		$8,761,023.32	

For the period from September 8, 1924, to December 1, 1932—Principal Account

	The Trustees are charged as follows, with:	
	Amount of stocks and securities on hand September 8, 1924, the date of the Trustees' last accounting, representing investments of principal of the Trust, at the book value or cost of the respective items, together with the cash on hand on said date, as shown in Schedule A–1	$8,712,475.85
	Amount of receipts of principal in cash and securities, from the Trustees under the Will of Henry H. Rogers, deceased, as shown in Schedule A–2	139,481.05
	Amount of refund from the Treasury Department of the United States of America of over-assessment of Federal income tax, as shown in Schedule A–3	53,061.86
	Amount of profit on sale, collection or other distribution of property, which realized an amount greater than the book value or cost thereof, as shown in Schedule A–4	205,111.26
		$9,110,154.02
	The Trustees are credited as follows, with:	
	Amount of payments chargeable against principal for necessary expenses of the Trust, as shown in Schedule B–1	$37,426.57
143	Amount of loss on sale or other disposition of property which realized an amount less than the book value or cost thereof, as shown in Schedule B–2	14,044.89
	Amount of payments to Henry H. Rogers in stocks, securities and cash, at the value at which the respective items of such stocks and securities were delivered, as shown in Schedule B–3	69,749.52

Amount of payment to Henry H. Rogers of refund of over-assessment of Federal income tax, as shown on Schedule B-4	$52,293.53	
Balance of principal on hand December 1, 1932, the date of this accounting, consisting of stocks and securities held as investments of the Trust, at the book value or cost of the respective items, together with the cash on hand, as shown in Schedule E	$8,936,639.51	$9,110,154.02

Income Account

The Trustees are charged as follows, with:		
Balance of cash income on hand September 8, 1924, as per Trustees' former account, dated September 8, 1924		$48,547.47
Receipts of income from the collection of coupons, dividends and interest as shown in Schedule F		$5,471,529.50
		$5,520,076.97
The Trustees are credited as follows with:		
Payments of income for necessary expenses of the Trust, as shown in Schedule G-1	$17,817.50	
Payments of income on account of Trustees' commissions, as shown in Schedule G-2	342,210.51	
Payments of income for accrued interest or for accrued dividends on investments purchased, as shown in Schedule G-3	7,100.46	
Payments of income from the Trust Estate to Henry H. Rogers, the life beneficiary, as shown in Schedule G-4	5,121,584.76	
Balance of cash income on hand, December 1, 1932	31,363.74	$5,520,076.97

144 For the period from December 1, 1932 through November 3, 1938—Principal Account

The Trustees are charged as follows:		
With amount of assets on hand as per Trustees' former account dated December 1, 1932, as shown by Schedule "A"	$8,936,639.51	
With increase, as shown in Schedule "A-1"	5,399,645.12	
With increase, as shown in Supplemental Schedule "A-1"	313.41	
With increase, as shown in Supplemental Schedule "AA-1"	25,823.00	
With additional assets received, as shown by Supplemental Schedule "AA-2"	332.71	
		$14,362,753.75
The Trustees are credited as follows:		
With decreases, as shown by Schedule "B"	$1,116,611.04	
With decreases, as shown by Supplemental Schedule "B"	270.00	
With decreases, as shown by Supplemental Schedule "BB"	757,091.07	

With amount of disbursements as shown by Schedule "C"	$156,461.24	
With amount of disbursements as shown by Supplemental Schedule "C"	119,611.54	
With amount of disbursements as shown by Supplemental Schedule "CC"	6,675.45	
With amount transferred to income as shown by Schedule "C-1"	25,637.67	
With amount of distributions as shown by Supplemental Schedule "F"	3,500,000.00	
		$5,682,358.01
		$8,680,395.74
From which should be deducted one-fourth of the expenses of the Yacht Kanawha in accordance with objection numbered 6 of Stephen P. Nash, Esq. sustained by the Surrogate		2,684.57
145 Leaving a balance on hand as shown by Supplemental Schedule "HH" consisting of:		
Securities	$7,011,263.11	
Cash	1,666,448.06	
		$8,677,711.17

Income Account

The Trustees are charged as follows:		
With amount of income on hand, as per Trustees' former account dated December 1, 1932, as shown by Schedule "AA"	$31,363.74	
With amount of income collected as shown by Schedule "A-3"	1,360,644.29	
With amount of income collected as shown by Supplemental Schedule "A-3"	140.93	
With amount of income collected as shown by Supplemental Schedule "AA-3"	3,438.25	
With amount of income collected as shown by Schedule "A-3(a)"	550,888.68	
With amount of income collected as shown by Supplemental Schedule "A-3(a)"	220,249.89	
With amount of income collected as shown by Supplemental Schedule "AA-3(a)"	391,821.99	
With amount of income collected as shown by Schedule "A-4"	1,557.70	
With amount of increase as shown by Schedule "H-1"	176.50	
With amount of increase as shown by Supplemental Schedule "AA-5(a)"	2,566.06	
		$2,563,348.03
The Trustees are credited as follows:		
With amount of decrease, as shown by Supplemental Schedule "AA-5"	$101.20	
With amount of decrease, as shown by Supplemental Schedule "A-5"	3.75	
With amount of decrease, as shown by Supplemental Schedule "HH-1"	179.08	
With amount of disbursements as shown by Schedule "C-2"	2,877.26	

146 With amount of disbursements as shown by Schedule "C-2 (a)"	$10.60	
With amount of disbursements as shown by Supplemental Schedule "C-2 (a)"	5.93	
With amount of disbursements as shown by Supplemental Schedule "CC-2 (a)"	5.26	
With amount of commissions as shown by Schedule "C-3"	112,587.67	
With amount of commissions as shown by Schedule "C-3 (a)"	20,709.41	
With amount of commissions as shown by Supplemental Schedule "CC-3 (a)"	13,723.65	
With amount of payments as shown by Schedule "F-1"	1,210,020.82	
With amount of payments as shown by Schedule "F-2"	114,704.69	
With amount of payments as shown by Supplemental Schedule "F-2"	50,840.87	
With amount of payments as shown by Supplemental Schedule "FF-2"	118,597.27	
		1,644,367.46
		$918,980.57
To which should be added one-fourth of the expenses of the Yacht Kanawha in accordance with objection numbered 6 of Stephen P. Nash, Esq., sustained by the Surrogate		2,684.57
Leaving a balance of income on hand as shown by Supplemental Schedule "HH-1" consisting of:		
Securities	$842.72	
Cash	920,822.42	$921,665.14

147 And it appearing that said trustees and the executor of said deceased trustee have fully accounted for all the moneys and property of said trust fund which have come or should have come into their hands as such trustees or into the hands of said deceased trustee and said account having been adjusted by the Surrogate and a summary statement having been made as above set forth and herewith recorded, it is hereby

Ordered, adjudged, and decreed as follows:

21. That the account of proceedings of City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe, as trustees, and of John W. Sterling, deceased trustee, of the trust fund created for the benefit of Henry H. Rogers, Jr. under Article Eighth of the last will and testament of Henry H. Rogers, deceased, be and the same hereby is judicially settled and allowed, and that the filing as part of said account of the first and second supplemental accounts and supplemental affidavit of said trustees without issuance of a separate citation be and the same hereby is ratified, approved and confirmed.

22. That out of the balance of principal remaining in their hands, as above set forth, said trustees make the following payments:

To Stephen P. Nash, Esq., as and for his allowance as special guardian herein for the infants Arturo Henry Peralta Ramos and Paul Jaime Peralta Ramos and for the unknown and unborn parties herein	$37,427.07
To John Caldwell Myers, Esq., as and for his allowance as co-general guardian appearing herein for his ward Peter Alfred Constantin Maria Salm, and infant	$35,000.00
To City Bank Farmers Trust Company as and for the commissions to which it is entitled on this accounting for receiving and paying out principal of said trust fund	$108,576.98
To Adrian H. Larkin Esq., as and for the commissions to which he is entitled on this accounting for receiving and paying out principal of said trust fund	$123,421.78
To William R. Coe, as and for the commissions to which he is entitled on this accounting for receiving and paying out principal of said trust fund	$123,421.78
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased, in payment of the balance of principal of said trust fund which was due said Henry H. Rogers, Jr. upon attaining the age of forty years and was not then paid to him	$17,914.74

And it appearing that it is necessary that the trustees retain in their hands the sum of $5,509,597.55 as a reserve for the purpose of paying possible additional estate and income taxes and legal and other expenses and commissions of said trust fund;

148 And it further appearing that all parties interested in the principal of said trust fund have executed duly acknowledged consents to distribution of the securities remaining in the hands of said trustees in kind, which consents have been filed herein, and which consents set forth in Schedule I annexed thereto certain designated securities to be retained by said trustees on account of said reserve herein, it is hereby further

Ordered, adjudged, and decreed:

23. That said trustees set aside and retain in their hands as and for such reserve the securities listed and set forth in Schedule I attached to said consents to distribution in kind at the values set opposite the same, amounting in all to $5,344,309.61 and the sum of $165,287.94 in cash and that from said reserve said trustees pay any and all estate and income taxes and legal and other expenses and commissions which may be or may become due and payable therefrom, that as and when such taxes and other charges are paid from time to time said trustees may pay over and distribute such portion of such reserve fund as may be thereby released and that after payment of all such charges said trustees pay over and distribute any

balance of said reserve remaining in their hands to the persons entitled to distribution of principal of said trust fund in the proportions to which they are entitled, as hereinbefore determined, and that pending final distribution of such reserve the income therefrom be collected and distributed by said trustees directly to the persons entitled to receive income of said trust fund in the proportions to which they are entitled as hereinbefore determined without responsibility on the part of Central Hanover Bank & Trust Company, Adrian H. Larkin and Albert Stickney as Executors of and Trustees under the will of Henry H. Rogers, Jr., deceased, for the collection and distribution of such income.

24. That so long as such reserve or any part thereof shall remain in the hands of said trustees they shall have the sole responsibility with respect to the administration thereof and there shall be vested in said trustees all of the powers and authority with respect to the holding, management, sale, investment and reinvestment of assets comprising said reserve which are granted to them by the will of Henry H. Rogers, deceased, or which they may have by operation of law and that said reserve shall be administered by them in all respects in accordance with the provisions of the will of Henry H. Rogers, deceased, relating to the said trust fund.

And it appearing that after making the payments and deductions hereinbefore directed there will remain in the hands of said trustees a balance of principal of said trust fund of $2,722,351.27 of which $1,055,397.77 is in cash and the balance is invested in securities at the values set opposite the same in the consents to distribution in kind filed herein, it is further

Ordered, adjudged, and decreed:

That said trustees pay over, transfer and distribute said balance of principal as follows:

25. That one-third of said balance of $2,722,351.27, to wit, $907,450.42 be set aside and constituted as the share of Pauline Hoving, consisting of $351,799.26 in cash and $555,651.16 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

149 26. That out of the share of said Pauline Hoving as so constituted, the sum of $60,501.29 in cash, representing 6.667% of said share, which she or her assignees are entitled to receive outright be disposed of as hereinafter set forth in decretal paragraph numbered 41 of this decree.

27. That one-half of the balance of the share of said Pauline Hoving remaining after deduction of said 6.667%, as hereinbefore directed, to wit, the sum of $423,474.56 be paid over

and transferred outright to Mary Millicent Balcom in payment of her distributive share therein under the provisions of the will of Henry H. Rogers, Jr., deceased, by reason of the remarriage of said Pauline Hoving, and that said payment and transfer be made by paying said Mary Millicent Balcom in cash the sum of $145,648.98 and by transferring and delivering to her the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting in all to the sum of $277,825.58.

28. That the other one-half of said balance of share of said Pauline Hoving remaining after deduction of said 6.667% as hereinbefore directed, to wit, the sum of $423,474.57 be paid over and transferred to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Pauline Hoving under Article twelfth of the last will and testament of Henry H. Rogers, Jr., deceased, and that said payment and transfer be made by paying said trustees in cash the sum of $145,648.99 and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting in all to $277,825.58.

29. That one-third of said balance of $2,722,351.27 of principal, to wit, the sum of $907,450.42 be set aside and constituted as the share of Mary Millicent Balcom, consisting of $351,799.25 in cash and $555,651.17 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

30. That out of said share of said Mary Millicent Balcom as so constituted, the sum of $60,501.29 in cash representing 6.667% of said share which she is entitled to receive outright be paid to her by said trustees.

31. That the balance of the share of said Mary Millicent Balcom remaining after deduction of said 6.667% as hereinbefore directed, to wit, the sum of $846,949.13 be paid over and transferred to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Mary Millicent Balcom under Article twelfth of the last will and testament of Henry H. Rogers, Jr., deceased, and that said payment and transfer be made by paying said trustees in cash the sum of $291,297.96 and by transferring and delivering to them the securities set forth in Schedule II annexed to the consents to distribution in kind filed herein at

the values set opposite the same therein, amounting in all to $555,651.17.

32. That one-third of said balance of $2,722,351.27 of principal, to wit, $907,450.43 be set aside and constituted as the share of Peter Alfred Constantin Maria Salm, consisting of $351,799.26 in cash and $555,651.17 in the securities set forth in Schedule II annexed to said consents to distribution in kind filed herein at the values set opposite the same in lieu of the money value thereof.

150 33. That out of the share of said Peter Alfred Constantin Maria Salm as so constituted, the sum of $60,501.29 in cash, representing 6.667% of said share which he is entitled to receive outright, be paid by said trustees to Mary Millicent Balcom and John Caldwell Myers, Esq. as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm, an infant.

34. That out of the balance of the share of said Peter Alfred Constantin Maria Salm remaining after deduction of said 6.667%, as hereinbefore directed, to wit, the sum of $846,949.14, there be paid over and transferred the sum of $500,000 to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as trustees for the benefit of said Peter Alfred Constantin Maria Salm under Article Thirteenth, subdivision 3 of the last will and testament of Henry H. Rogers, Jr., deceased, and that payment and transfer be made by paying to said trustees the sum of $222,174.42 in cash and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting to $277,825.58.

35. That the balance of the share of said Peter Alfred Constantin Maria Salm remaining after deduction of said 6.667% and said $500,000 as hereinbefore directed, to wit, the sum of $346,949.14, be paid over and transferred to Mary Millicent Balcom and John Caldwell Myers, Esq. as co-general guardians of said Peter Alfred Constantin Maria Salm, an infant, and that said payment and transfer be made by paying to said co-general guardians in cash the sum of $69,123.55 and by transferring and delivering to them the securities set forth in Schedule III annexed to the consents to distribution in kind filed herein at the values set opposite the same therein, amounting to $277,825.59.

And it appearing that the amounts hereinbefore directed to be retained by the trustees as a reserve fund for the payment of taxes and other expenses, consist largely of securities at

agreed values and that it is possible that said securities may fail to realize upon liquidation the amounts which may be necessary to pay such taxes and other expenses as and when the same become due and payable and that said taxes and other expenses in such event should be paid from the principal amounts hereinbefore directed to be distributed, it is hereby

Ordered, adjudged, and decreed:

36. That the distributions of principal directed to be made in this decree to Pauline Hoving or her assignees, Mary Millicent Balcom, Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as trustees under the last will and testament of Henry H. Rogers, Jr., deceased, for the benefit of Pauline Hoving; Peter Alfred Constantin Maria Salm, and of Mary Millicent Balcom, respectively, and Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of Peter Alfred Constantin Maria Salm, an infant, shall be deemed made subject to any taxes or other proper charges which hereafter may be found to be due and payable from said trust fund, and the said trustees shall receive and the said distributees shall deliver to the said trustees as a condition of the payments of principal directed to be made by this decree to said beneficiaries a refunding agreement containing a provision on the part of the said distributees that out of the amounts whether cash or securities received by them pursuant to the provisions of this decree, or as the case
151 may be out of the proceeds of sale, investment or reinvestment thereof, but only to the extent thereof, they agree to reimburse and repay said trustees their proportionate share or shares of any such taxes or other charges which may become due and payable from said trust funds in excess of the amount remaining or available in the hands of the trustees for the purpose of meeting the same.

36a. That any refund that may become due and payable from the share of said Pauline Hoving pursuant to the provisions of paragraph 36 of this decree, shall first be refunded and paid from the principal directed to be paid to her outright under this decree, and only in the event that such principal funds paid to her outright shall be not sufficient for the purpose of paying said refund shall any excess of such refund not repaid by her be repaid proportionately by her assignees set forth in decretal paragraph 41 of this decree in the proportions which the amounts of principal which said assignees receive thereunder bear to each other.

36b. That any refund that may become due and payable from the share of said Peter Alfred Constantin Maria Salm

pursuant to the provisions of paragraph 36 of this decree, shall first be refunded and paid from the principal directed to be paid outright to Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of said Peter Alfred Constantin Maria Salm under this decree, and only in the event that such principal funds paid to said co-general guardians outright be not sufficient for the purpose of paying said refund, shall any excess of such refund not repaid by said co-general guardians be repaid out of the sum of $500,000 which is directed by decretal paragraph 18 of this decree to be paid to Central Hanover Bank & Trust Company, Adrian H. Larkin and Albert Stickney, as Trustees under Article Thirteenth, Subdivision 3, of the last will and testament of Henry H. Rogers, Jr., deceased.

And it further appearing from the summary statement of the account of said trustees as hereinbefore set forth that there remains in the hands of said trustees a balance of income of said trust of $921,665.14 which is distributable as set forth in Schedule B annexed to the supplemental affidavit filed herein, it is hereby

Ordered, adjudged, and decreed:

37. That out of the said balance of income so remaining in their hands, the Trustees make the following payments:

To City Bank Farmers Trust Company as and for the commissions to which it is entitled upon this accounting for receiving and paying out income of said trust	$11,364.98
To Adrian H. Larkin, Esq., as and for the commissions to which he is entitled upon this accounting for receiving and paying out income of said trust	12,130.27
To William R. Cee, Esq., as and for the commissions to which he is entitled upon this accounting for receiving and paying out income of said trust	12,130.26
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney, as executors of the last will and testa- of Henry H. Rogers, Jr., deceased, the sum of	62,027.07
152 Which payment shall be made by paying to them in cash the sum of $61,184.35 and by transferring and delivering to them the securities held for the benefit of the estate of said Henry H Rogers, Jr., deceased, as set forth in Schedule "III-1" of the second supplemental account filed herein at the value set opposite the same therein, to wit, $842.72.	
To themselves to be held as a reserve for payment of commissions on income reserves	12,812.19

and it further appearing that after making payments and deductions as hereinbefore directed there will remain in the hands of said trustees a balance of income of said trust fund of $811,200.37 all of which is cash, which amount is distributable as set forth in said Schedule B annexed to said supplemental affidavit filed herein, it is hereby further

Ordered, adjudged, and decreed:

That said trustees pay over, transfer, and distribute said balance of income as follows:

38. That they set aside the sum of $206,7[illegible]42 as and for the share of Pauline Hoving and that out of said amount they retain the sum of $151,031.84 as a reserve against possible income taxes or other charges apportionable to her said share and that they dispose of the balance of said share amounting to $145,748.58 as hereinafter set forth in decretal paragraph 41 of this decree.

39. That they set aside the sum of $199,631.90 as and for the share of Mary Millicent Balcom and that out of said amount they retain the sum of $109,794.55 as a reserve against possible income taxes or other charges apportionable to her said share and that they pay over the balance of said share amounting to $89,837.35 to said Mary Millicent Balcom outright.

40. That they set aside the sum of $314,788.05 as and for the share of Peter Alfred Constantin Maria Salm and that out of said amount they retain the sum of $153,434.54 as a reserve against possible income taxes or other charges apportionable to his said share, and that they pay over the balance of said share amounting to $161,353.51 to Mary Millicent Balcom and John Caldwell Myers, Esq., as co-general guardians of the estate of Peter Alfred Constantin Salm, an infant, outright.

And it appearing that there is due and payable to said Pauline Hoving from said trust fund the sum of $60,501.29 of principal and the sum of $145,748.58 of income as hereinbefore determined, making a total of $206,249.87 in all, and that said Pauline Hoving has consented and requested that out of said amount due her, whether principal or income, there be paid and satisfied the amounts due under the several assignments of her interest in said trust fund executed by her and referred to and set forth in Schedule I of the main account filed herein and in the supplemental affidavit filed herein, it is hereby

Ordered, adjudged, and decreed:

41. That said amount of $206,249.87 due said Pauline Hoving be paid over and distributed as follows:

153 To The New York Trust Company in payment of the amount due under its assignment dated March 17, 1936, with interest thereon at 4% to January 15, 1939	$43,138.56
To Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased, in payment of the amount due them under their assignments dated June 31, 1936, and August 12, 1936, respectively, and under the assignments as collateral security to Massachusetts Bonding and Insurance Company as surety of said Pauline Hoving dated December 15, 1936, and June 18, 1937	$48,293.71
To Messrs. Sage, Gray, Todd & Sims in payment of the amount due them under their assignments dated April 16, 1936, and October 6, 1937, with interest thereon at 4% from February 1, 1938, to January 15, 1939	$15,694.36

To Messrs. Mitchell, Taylor, Capron & Marsh in payment of the amount due them under their assignment dated April 29, 1938, with interest thereon at 4% from March 22, 1938, to January 15, 1939	$46,004.29
To Oswald W. Knauth, Esq., in payment of the amount due him under his assignment dated August 31, 1938, with interest thereon at 6% from August 29, 1938, to January 15, 1939	$10,801.95
To said Pauline Hoving the balance of said amount of $206,249.87 remaining after making the payments to her assignees as hereinbefore directed, to wit, the sum of	$12,317.00

And it appearing from Schedule "HH-2" of the second supplemental account filed herein that the trustees hold in their possession the sum of $4,293.07 not forming any part of the assets of the trust fund herein accounted for, but representing amounts held by them for the account of the estate of Henry H. Rogers, Jr., deceased, which were due and payable to him by reason of his attaining the age of forty years and which have come into the possession of said trustees by way of distribution from the so-called "General Trust Fund", it is hereby

Ordered, adjudged, and decreed:

42. That said trustees pay over said sum of $4,293.07 to Central Hanover Bank and Trust Company, Adrian H. Larkin and Albert Stickney as executors of the last will and testament of Henry H. Rogers, Jr., deceased; and it is further

Ordered, adjudged, and decreed:

43. That this decree is made without prejudice to the right of said trustees to pay and the right of counsel for said trustees to apply for and receive, pursuant to Section 231-a of the Surrogate's Court Act, or otherwise, compensation for legal services rendered in addition to those services which have already been paid for by said trustees, provided, how-
154 ever, that the amount of any such additional compensation shall be subject to the approval of the persons beneficially interested in the said trust fund and of this Court; and it is further

Ordered, adjudged, and decreed:

44. That upon complying with the provisions of this decree, City Bank Farmers Trust Company, Adrian H. Larkin and William R. Coe be and they hereby are discharged from any and all further liability, responsibility, or accountability for or by reason of any matter, cause, or thing whatsoever connected with or growing out of their administration of the trust fund created for the benefit of Henry H. Rogers, Jr., deceased, under Article Eighth of the Last Will and Testament of Henry H. Rogers, deceased, contained, or referred to or covered by their accounts as filed herein or in this decree, except that said trustees remain charged with and accountable for the balances

of principal and income directed to be reserved and retained by them by this decree; and it is further

Ordered, adjudged, and decreed:

45. That the estate of John W. Sterling, deceased trustee of the said trust fund created for the benefit of Henry H. Rogers, Jr., deceased, under Article Eighth of the last will and testament of Henry H. Rogers, deceased, and City Bank Farmers Trust Company, as sole surviving executor of the estate of said deceased trustee, be and they hereby are discharged from any and all further liability, responsibility, or accountability for or by reason of any matter, cause, or thing whatsoever connected with or growing out of the administration of said trust fund by the said deceased trustee or referred to or covered by the account of said deceased trustee as filed herein or in this decree; and it is further

Ordered, adjudged, and decreed:

46. That any party to this proceeding may apply at the foot of this decree for such other and further relief as such party may deem proper or necessary.

JAMES A. FOLEY,
Surrogate.

135 No File Number. Surrogate's Court, County of New York. In the matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company *et al.* as Trustees of the Trust Created for the Benefit of Henry H. Rogers, Jr., under Article Eighth of the Last Will and Testament of Henry H. Rogers, deceased. Decree with Notice of Settlement. David, Polk, Wardwell, Gardiner & Reed, Attorneys for Petitioners, 15 Broad Street, Borough of Manhattan, City of New York, New York.

156 In the United States Circuit Court of Appeals for the Second Circuit

Docket No. 100026

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY H. ROGERS, DECEASED, RESPONDENT ON REVIEW

Præcipe for record on review

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals:
   (a) Petition, including annexed copy of deficiency notice.
   (b) Answer.
3. Transcript of hearing before the Board on June 5, 1941.
4. Memorandum Opinion and decision of the Board, including memorandum accompanying decision.
5. Transcript of hearing before the Board on March 18, 1942.
6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
7. Stipulation of Facts, including Exhibits "A," "B," "C," and "D."

157 8. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record, not included in record.

9. This praecipe.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 12th day of November 1942.

Agreed to:

JOHN W. DRYE, Jr.
HAROLD A. DONEGAN.
ARTHUR W. SIEGRIST.

John W. Drye, Jr., Harold A. Donegan, and Arthur W. Siegrist, Esqs., Attorneys for Respondents on Review.

RFS-spt 11-6-42.

The Tax Court of the United States, Washington

Docket No. 100026

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, RESPONDENT

Certificate

I, B. D. Gamble, clerk of the Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 157, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of November 1942.

Time for filing record expires December 17, 1942.

[SEAL]

B. D. GAMBLE, *Clerk,*
The Tax Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1942

[fol. 113] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 170

(Argued February 4, 1943. Decided April 2, 1943)

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF HENRY H. ROGERS, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, Respondents

Petition by the Commissioner of Internal Revenue to review a decision of the Tax Court of the United States. Reversed.

Before L. Hand, Chase and Frank, Circuit Judges.

Samuel O. Clark, Jr., Assistant Atorney General, Sewall Key, Helen R. Carloss, Arthur A. Armstrong and N. Barr Miller, Special Assistants to the Attorney General for Petitioner.

John W. Drye, Jr., Harold A. Donegan and Arthur W. Siegrist, for Respondents.

[fol. 114] § 302(f) of the Revenue Act of 1926 provides that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * (f) to the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *"

Decedent's father created a testamentary trust. Under its terms, decedent was to receive the income, and, upon attaining the age of 40, one-half of the principal. The balance was to continue in trust with the payment of income to decedent for life; upon his death, the principal was to go to such persons as he might appoint, or, in default of appointment, to his "heirs-at-law," in accordance with the New York law relating to the inheritance of real property. The heirs-at-law of decedent at the time of his death were his widow, his daughter and his son Henry III.

Decedent, by his will, probated in New York, exercised the power of appointment as follows: Of the property sub-

ject to the power, 6.667% was appointed outright in equal shares to his widow, to his daughter and to his grandson, Peter. The balance was divided into three parts as follows: (a) One-third was appointed in trust with the income to the widow for life; upon her death the principal was to go to the then-surviving issue, if any, of her marriage with decedent; in the event of her re-marriage, however, half of that principal was to continue in the trust to her for life but the other half was to go immediately to the remaindermen. (b) Another one-third was appointed in trust with the income to the daughter for life; at her death, the principal of this one-third was to go outright to her issue. (c) The other third was appointed to the decedent's grandson, Peter. When decedent died, his widow was 45 years of age, and his daughter 33 years of age. None of the appointees renounced and elected to take under the will of decedent's father.

[fol. 115] The Commissioner determined that all the property covered by all the appointments should be included in decedent's gross estate under §302(f). On petition to the Tax Court of the United States, it found that the interests appointed to the widow and daughter respectively had a value less than that of the interests which each of them would have received if there had been no exercise of the power, and accordingly excluded from the value of decedent's gross estate the value of the interests appointed to them. The case is here on the Commissioner's petition to review.

FRANK, *Circuit Judge:*

This court disagrees with the Tax Court and agrees with the Commissioner. However, the several members of this court arrive at that conclusion by different paths. I shall, therefore, describe only my own path.

The taxpayer, purporting to rely on *Helvering* v. *Grinnell*, 294 U. S. 153, contends that, if there had been an exact equivalence between the interests appointed to the widow and daughter and the interests which those beneficiaries respectively would have received if the power had not been exercised, then those appointed interests would not be included in decedent's estate under §302(f), and that this is an *a fortiori* case, since the interests appointed to the widow and daughter are less in value than the interests which they

would have received if the power had remained wholly unexercised. I think that the taxpayer has misinterpreted *Helvering* v. *Grinnell*. There, although there was an exact equivalence, the court held, I think, that there was no tax solely because the beneficiaries had renounced the appointments. In other words, I interpret that case as holding that, absent renunciations, there would have been a tax despite the existence of an exact equivalence.

[fol. 116] The taxpayer, citing *Rothensies* v. *Fidelity-Philadelphia Trust Company*, 112 F. (2d) 758 (C. C. A. 2), and *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4), argues thus: In the *Grinnell* case, the court indicated that the "reasoning and conclusions" of the courts in *Wear* v. *Commissioner*, 65 F. (2d) 665 (C. C. A. 3), and *Lee* v. *Commissioner*, 57 F. (2d) 399 (App. D. C.), were inconsistent with its own conclusion; in each of those cases, there was (a) an exercise of the power and (b) exact equivalence but (c) there was no renunciation; consequently (says taxpayer) there could have been no inconsistency with *Grinnell* if the Supreme Court, in *Grinnell*, had regarded renunciation as in any way a relevant fact; wherefore it is urged the pivotal fact in *Grinnell* was the equivalence.

That argument seems to me to be untenable. It seems clear that the reference to "inconsistency" in the *Grinnell* case is explicable thus: (a) In *Wear* and *Lee*, the courts had reasoned that the interests passed to the beneficiaries by virtue of the exercise of the power, solely because the donee of the power, by designating a stranger, could have divested the beneficiaries of the interests, which they would have received in default of any appointment, with the consequence that the exercise of the power extinguished this possibility of divestiture. Thus in the *Wear* case, the court said (65 F. (2d) at 665): "The generating source of the change was the death of the donee without action adverse to them. That too was the generating source of the tax." In the *Lee* case, the court said (57 F. (2d) at 402): "It is argued that the tax should not apply to that transfer, inasmuch as without it the moiety would nevertheless have become the property of George Bolling Lee as devisee under his father's will. This view cannot be sustained. It is true that, if Robert E. Lee at the time of his decease had entirely omitted to exercise the power of which he was the donee, his brother, George Bolling Lee, would have held the moiety of the

[fol. 117] former by devise under the will of W. H. F. Lee. But, on the other hand, *Robert E. Lee was entitled during his lifetime to appoint the moiety to any other person, and thus defeat the devise to George Bolling Lee.* Therefore the exercise of this power by Robert E. Lee at least confirmed the title of his brother to the moiety in question."[1] (b) Had that reasoning been sound, renunciation of the appointments and election to take under the donor's will would not have avoided a tax; for the alleged effect of the exercise of the power—by way of extinguishing the possibility of divestiture—would still have been operative despite that renunciation and election. (c) There was, accordingly, a plain inconsistency between the "reasoning" of *Wear* and *Lee* and what I understand to be the Supreme Court's ruling in *Grinnell, i. e.*, that it was solely the renunciation which avoided tax.[2] (d) There was a still further inconsistency. As suggested by the opinion of the lower court in *Grinnell*,[3] the reasoning of the courts in *Wear* and *Lee* logically compelled the conclusion that Congress intended to include in §302(f) as "property passing under a general power of appointment *exercised* by the decedent," property which passed when he did not exercise the power; for the non-exercise—as well as the exercise in favor of the beneficiaries in default—would effectuate an extinguishment of the possibility of divestiture, and such an extinguishment accomplished a "passing" under the [fol. 118] power according to *Wear* and *Lee*. But in *Grinnell* it was the "conclusion" of the Supreme Court that §302(f) did not operate unless there was an "exercise of the power." (See 294 U. S. at 155.)

In support of the view that renunciation was not the key factor in *Grinnell*, much is made of the fact that in that case the Supreme Court cited and quoted from *Matter of Lan-*

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[1] Emphasis added.

[2] In so far as the *Rothensies* and *Legg* cases, *supra*, reach a different conclusion, I think they are in error.

[3] *Grinnell* v. *Commissioner*, 70 F. (2d) 705 (C. C. A. 2). There it was said of the opinion in the *Wear* case (p. 708): "Such reasoning would require the imposition of a tax under the Act even though Annie Stone [the donee of the power] had died intestate though the statute furnishes no warrant for taxation under such circumstances."

sing, 182 N. Y. 238, referring to it as "that well considered case" and saying that "in principle" it "cannot be distinguished." But in the *Lansing* case, the New York court had stressed the fact that the appointee had "elected" to take under the will of the donor, her grandfather, and not under the power of appointment exercised by her mother, the donee of the power. The court said: "There is no evidence in the record that she ever accepted the appointment or claimed title through the exercise of the power, but on the other hand, it sufficiently appears that she elected to reject title from that source. An appointee under a power has the right of election, the same as a grantee under a deed. 'It is essential to the legal operation of a deed that the grantee assents to receive it. It cannot be imposed upon him, and there can be no delivery without an acceptance.' (*Jackson* v. *Dunlap*, 1 Johns. Cas. 114, 116; *Jackson* v. *Phipps*, 12 Johns. 418.) He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where [fol. 119] it was before." The Supreme Court, in *Grinnell* (284 U. S. at 157), when referring to *Lansing*, noted that the state court had said "that it sufficiently appeared that she elected to reject title" through the power, and quoted from the *Lansing* opinion the discussion concerning "election" and "declining or refusing to take."

Notwithstanding the foregoing, I might hesitate to interpret *Grinnell* as I have done, because of a seemingly contrary interpretation by this court in *Hanover Bank & Trust Company* v. *Commissioner*, 118 F. (2d) 270, 273, were it not for the subsequent decision in *Helvering* v. *Safe Deposit Company*, 316 U. S. 55, 56. There relatives of a decedent asserted a claim as appointees under his will, or in the alternative, as his heirs by intestacy. The claim was compromised and the question was whether there was any tax under §302(f) because of the appointment. The Su-

preme Court held that there was such a tax and remanded the case to the Tax Board to determine how much of the property should be deemed to have passed under the appointment (with the consequence that it was taxable) and how much by intestacy (with the consequence that it was not taxable). In the course of the court's opinion, it discussed a contention that the "taxable event" occurred upon the death of the decedent and that a tax could not be based upon the compromise since it occurred after that event. Answering that contention, the court said: "Whatever may the general rule in this respect, this court has clearly recognized in *Helvering* v. *Grinnell*, 294 U. S. 153, that events subsequent to the decedent's death, *events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under §302 (f).* In that case, the decedent had exercised a general testamentary power of appointment, an act which, under §302(f), bring the property subject to the power within the gross estate. *The subsequent renunciation by the ap-* [fol. 120] *pointees* of the right to receive by appointment *and their election to take as remaindermen in default of appointment were held by this court to place the property subject to the power outside the scope of §302(f).*"[4] This comment is meaningless unless the court regarded the renunciation as the significant factor in *Grinnell*. The minority opinion in the *Safe Deposit* case similarly interprets *Grinnell*, saying (316 U. S. at 68): "In *Helvering* v. *Grinnell*, *supra*, the decedent exercised the power, but *the appointees*, as was their right under state law, *elected not to take under the appointment* but to take as remaindermen directly from the estate of the creator of the power, and it was held that §302 could not be invoked to impose a tax upon the estate of the decedent."[5]

Accordingly, I think that the Tax Court here was wrong, and that, as there were no renunciations, all the appointed interests must be included in decedent's estate under §302(f).

The decision of the Tax Court is reversed.

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[4] Emphasis added.

[5] Emphasis added.

L. HAND, *Circuit Judge* (concurring):

The donor in the case at bar made the gift in default conditional upon the failure of the donee to exercise the power, but the donee did exercise the power and the appointees accepted the appointment; it is therefore hard to see how in strict logic anything could pass under the will. A conditional interest does not take effect unless the condition is fulfilled; and indeed it can be argued that even though the appointees renounce, they should not be allowed to take under the gift in default, for renunciation after exercise of [fol. 121] the power is not the equivalent of a failure to exercise it. But that would result in forcing the appointees to choose between taking under the power or taking nothing at all, and the Supreme Court, following *In Re Lansing*, 182 N. Y. 238, refused to go so far in *Helvering* v. *Grinnell*, 294 U. S. 153, and held that when the appointees renounced, the property passed under the gift in default. There would have been nothing in that decision to contradict the theory that when they do not renounce, the property passes under the power, were it not that at the conclusion of the opinion (page 158) the court said that it had granted certiorari because the two cases of *Wear* v. *Commissioner*, 65 Fed. (2) 665 and *Lee* v. *Commissioner*, 57 Fed. (2) 399, were in conflict with the decision below; and then went on to say: "The reasoning and conclusions of those courts and of the court below cannot be reconciled. We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right." In both *Wear* v. *Commissioner*, *supra*, and *Lee* v. *Commissioner*, *supra*, the appointee had not, however, renounced, and *pro tanto* the reasoning in neither was in conflict with what had been said below as to the effect of renunciation; nor could it be. There was indeed conflict in reasoning because the two earlier cases had held that the exercise of a general power made the property a part of the donee's estate, which the lower court in *Helvering* v. *Grinnell*, *supra*, denied. The conflict in conclusion was necessarily complete, for the two earlier cases had held that the property passed under the power and not under the will, and while there was a ground of reconciliation in the fact of renunciation, the court did not suggest it.

The Third Circuit in *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 Fed. (2) 758 and the Fourth, in *Legg's Estate* v. *Commissioner*, 114 Fed. (2) 760, thought that *Helvering* v. *Grinnell*, *supra*, went further than merely to hold

[fol. 122] that nothing passed under the power in cases of renunciation, and that it required them to compare the interest appointed with that passing under the gift in default, and to adopt as the test whether the first could be regarded as coming out of the second. We at least gave countenance to the same notion in *Central Hanover B. & T. Co.* v. *Commissioner*, 118 Fed (2) 270, 273, and with narrow limitations it is laid down as law in the Restatement of Property, §369. Mr. Griswold has discussed it in 52 Harv. L. R. 929, 933-937 (Powers and the Federal Estate Tax) and Mr. Paul in Federal Estate and Gift Taxation §9.18. I cannot see that *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, sheds any light upon the question. In the face of this authority I am not prepared to say that where the appointee does not renounce, the interests appointed must inevitably pass under the power. There is something to be said practically for the contrary, once we refuse to accept the rule that any exercise of the power is irrelevant. Certainly no donee would ever exercise a power in favor of a legatee in default if he knew that its only effect would be to include the property within his taxable estate. Nor does it seem quite fair to put it into the appointee's hands by accepting, instead of renouncing, an appointment which makes no difference to him, to throw the tax upon the donee's estate. On less provocation courts have often avoided such harsh results by holding that the intent of the testator was not correctly expressed in his words. I think that in the case at bar we can leave the question open, because, whatever the scope of the doctrine, it seems to me obvious that no interests should be excluded from the donee's estate to whose creation the exercise of the power was necessary. Assuming for argument that those may be excluded which could have been made to pass under the gift in default by a more sparing use of the power, they must be the limit.

[fol. 123] There are two circumstances, each of which takes the case at bar out of the doctrine so understood: first, the life estates to the wife and daughter were equitable, not legal; and second, Peter, who was not a legatee in default, was an appointee, while Henry III, who was not an appointee, was a legatee in default. As to the first, there was no way other than by exercising the power that the donee could have changed the jural quality of what passed to his wife and daughter under the will. He could of course have appointed remainders to others, but that would not

have been enough. The difference between a legal and an equitable interest might not in all jurisdictions be today considered serious enough to count; we no longer think so rigidly as we used to of a trust as a transfer of title to the trustee against whom the beneficiary has only rights *in personam*. Be that as it may, in New York the beneficiary of a trust like that set up in the case at bar has no power to dispose of the property (Real Property Law §103(1)), and certainly that was a difference with which we cannot suppose that the donee was unconcerned. So I say that since he could not have realized his purpose without exercising the power over the interests of his wife and daughter it cannot be said that they took under the will.

Next as to the objection arising from the donee's appointment of a third interest to Peter for life with remainders over. Having created these, he could not have secured even a legal life interest in a third of the property to his wife or to his daughter without exercising the power over the whole of that third. Had he attempted to do so by merely appointing remainders over after their deaths upon what passed to them under the will, each would have taken a life interest in two-ninths, not one third, for Henry III would have taken a third of the two-thirds not disposed of. Had the donee tried to make up to each her missing ninth [fol. 124] by appointing it under the power, it would have come out of the two-thirds, and would have left to pass under the will, not two ninths to each, but four twenty-sevenths. And so on in an infinite diminishing series. Only by appointing to each her third could he have given her a third; and it follows that, as in the matter of the quality of the interest so in the matter of its quantity, there was no interest which could be left unappointed to pass under the will without mutilating the donee's purpose. This is not true when the appointees and the legatees in default coincide; nor need it be true where the appointees include all the legatees in default and more. For example if the legatees in default were three and the donee wished to have them share equally and in common with a fourth person also sharing, he need only appoint one quarter to the fourth. "Illustration 3" to § 369 of the Restatement is an instance of how the same result could be brought about when the class of legatees in default is not enlarged but the disvision between them is changed. (I should not agree however that only one sixth passed under the power. The

donee would have had to appoint one quarter to his daughter, because what he took from the gift in default would be marshalled against her share as well as the sons.)

For the foregoing reasons I reach the same result as my brother Frank without however committing us to the absolute doctrine that in the absence of renunciation all interests appointed must inevitably pass under the power.

CHASE, *C. J.*, concurs in the result.

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April, one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF HENRY H. ROGERS, Deceased, Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, Respondents.

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 126] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, Commissioner of Internal Revenue v. Estate of Henry H. Rogers, deceased, et al. Order for Mandate. United States Circuit Court of Appeals—Second Circuit. April 19, 1943. D. E. Roberts, Clerk.

[fol. 127] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 128] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 21, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 20 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1036 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

JOHN W. DRYE, JR.,
Counsel for the Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. _____

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable HARLAN FISKE STONE,
Chief Justice of the United States
and Associate Justices of the Supreme
Court of the United States:

Your petitioners respectfully submit their petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on April 19, 1943, reversing the decision of The Tax Court of the United States.

Summary Statement of the Matter Involved

Henry H. Rogers died on July 25, 1935, a resident of Southampton, New York, leaving a Will (R. 60-77) which

was duly admitted to probate and on which letters testamentary were duly issued (R. 46).

The father of said decedent, Henry H. Rogers, Senior, died on May 19, 1909, a resident of the City, County and State of New York, leaving a Will (R. 53-59) which was duly admitted to probate. By said Will, Henry H. Rogers, Senior, created a trust for the benefit of his son consisting of one-fourth of his residuary estate and directed his Trustees to apply the income of said trust to the use of said son until he should attain the age of forty years and at that time to convey to said son one-half of the principal of said trust. Decedent attained the age of forty years on December 28, 1919 and shortly thereafter the share of said trust to which he then became entitled was paid over to him. The Will of Henry H. Rogers, Senior, further provided that the Trustees should apply the income of the remaining one-half of said trust to the use of said son during his lifetime and upon his death that they should "convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of real property, according to the laws of the State of New York" (R. 46, 47).

By Articles Twelfth and Sixteenth of his Will, decedent exercised the power of appointment over the balance of said trust (R. 47), as follows:

6.667% of the corpus of said trust was appointed in equal shares outright to decedent's widow, Pauline V. Hoving, his daughter Millicent and his grandson Peter; and the balance of the corpus of said trust remaining after payment of said 6.667% was appointed one-third in trust for the benefit of his widow, one-third in trust for the bene-

fit of his daughter and one-third thereof outright to his grandson (R. 48, 49).

The "heirs at law" of decedent "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of the Will of decedent's father were his widow, his daughter and his son, Henry H. Rogers, Junior, who would have taken decedent's real property in equal shares if he had not left a will (R. 49). Thus, decedent's widow, his daughter and his son, if the power of appointment had not been exercised, would each have taken one-third of the trust property outright. Under the exercise of the power of appointment by decedent, his widow and his daughter each took one-third of 6.667% of the trust property outright and each took a life interest in the income of one-third of the balance of the trust property. No part of the trust property was given to decedent's son.

The Tax Court of the United States held that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of the widow and daughter under the Will of decedent's father and that, accordingly, no property passed to them under the exercise of the power. Under this decision the value of the reduced estates was excluded from the decedent's gross estate for Federal Estate Tax purposes (R. 25-27). The Circuit Court of Appeals reversed the determination of The Tax Court of the United States.

Statement of this Court's Jurisdiction to Review

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

The Statute Involved

The Statute involved in this case is the Revenue Act of 1926, c. 27, 44 Stat. 9, the material provisions of which are as follows:

> Sec. 302 (as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 754). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * * * * *
>
> (f) (as amended by Section 803(b) of the Revenue Act of 1932, c. 209, 47 Stat. 279). To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *.

The Question Presented

The question in this case is: Does any property pass under the exercise of a general power of appointment within the meaning of the above-quoted provisions of the Revenue Act when the effect of the exercise of the power is merely to reduce the already vested estates which the appointees had under the will of the donor of the power?

The Reasons Relied Upon for the Allowance of the Writ

1. There is a direct conflict, as the Court below expressly recognized (R. 117), between the decision in the instant case and *Rothensies* v. *Fidelity-Philadelphia Trust Company*, 112 F. (2d) 758 (C. C. A. 3rd) and *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4th).

2. The decision below is in conflict with *Helvering* v. *Grinnell*, 294 U. S. 153.

Conclusion

It is therefore respectfully submitted that this petition for a Writ of Certiorari should be granted.

JOHN W. DRYE, JR.,
Counsel for Petitioners,
70 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No.

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below.

The opinion in the United States Circuit Court of Appeals for the Second Circuit (R. 113-124) and the opinion in The Tax Court of the United States (R. 25-27) are unreported.

II

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

III

Statement of the Case.

The case has been stated in the preceding petition (pp. 1-3).

IV

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the decision of The Tax Court of the United States;

2. In failing to hold that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of his wife and daughter under the Will of his father and that no property passed to his widow and daughter under his exercise of the power;

3. In holding that the property or estates of the widow and daughter of the decedent in the trust created under the Will of decedent's father should be included as a part of decedent's gross estate for Federal Estate Tax purposes.

V

Summary of Argument.

The effect of the exercise by decedent of the general power of appointment given to him by his father's Will was to reduce the already vested estates which decedent's wife and daughter had under the Will of decedent's father and, accordingly, no property passed to decedent's widow or daughter under the exercise of the power within the purview of Section 302(f) of the Revenue Act of 1926, as amended.

Argument.

Section 302 of the Revenue Act of 1926, as amended, provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * * * *
>
> (f) Property Passing under General Power of Appointment.—To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *."

In *Helvering* v. *Grinnell*, 294 U. S. 153, the donee of a power of appointment had appointed the entire fund to the same persons who would have taken it if the power had not been exercised. The appointees had renounced their right to receive the property under the exercise of the power of appointment and had elected to take the property under the provisions of the will of the donor of the power. This Court held that no property passed under the exercise of the power of appointment and accordingly that no part of the appointed fund was includible in the gross estate of the decedent for Federal Estate Tax purposes. The opinion of the Court reads in part as follows:

> "The crucial words are 'property passing under a general power of appointment exercised by the decedent by will.' Analysis of this clause discloses three distinct requisites—(1) the existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise. Clearly, the general power existed and was exercised; and this is not disputed. But it is equally clear that no property passed under the power or as a result of its exercise since that result was definitely rejected by the beneficiaries. If they had wholly refused to take the prop-

> erty, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative. * * *
>
> "We granted the writ of certiorari in this case because of an alleged conflict with *Wear* v. *Commissioner*, 65 F. (2d) 665, and *Lee* v. *Commissioner*, 61 App. D. C. 33; 57 F. (2d) 399. The reasoning and conclusions of those courts and of the court below cannot be reconciled. *We are of opinion that, to the extent of the conflict, the view of the former is wrong and that of the court below is right, and we hold accordingly.*" (Italics supplied.)

The lower Court in the *Grinnell* case had pointed out (70 F. (2d) 705, 708):

> "* * * The appointees not only declined to take the gift, but the appointment when exercised in favor of the same persons who would take irrespective of it was 'a mere form with no substance' which the law of New York that regulates the passage of title has refused to recognize. Matter of Lansing, 182 N. Y. 238, 243, 74 N. E. 882. * * *"

No renunciation was involved in the *Wear* and *Lee* cases where the donees took the same estates under the exercise of the powers of appointment as they would have taken in default of the exercise of the powers. It is submitted that this Court, when it disapproved in the *Grinnell* case of the reasoning and conclusions in the *Wear* and *Lee* cases, decided that, irrespective of any renunciation, when no greater estate was conferred on the appointees by the exercise of the power of appointment the exercise added nothing of substance and no property passed thereby within the purview of the taxing statute. If the appointees' renunciation was the sole ground of the *Grinnell* decision, it seems clear that there would have

been no occasion to disapprove the reasoning and conclusions in the *Wear* and *Lee* cases. While property does not pass to an appointee under the exercise of a power of appointment if the appointee refuses to accept the gift, it seems just as obvious that an exercise of a power of appointment is in substance an empty gesture when it purports to pass to the appointee the same estate which has already vested in him, irrespective of any actual renunciation by the appointee.

Following the decision in the *Grinnell* case, the Circuit Courts of Appeals of the Third and Fourth Circuits and The Tax Court of the United States have held that where a person receives less under the exercise of a power of appointment than he would have received under the instrument creating the power in default of the exercise thereof, the exercise merely cuts down the estate of the appointee and accordingly that the property received by the appointee does not pass under the exercise of the power and the value thereof is not includible in the gross estate of the donee for Federal Estate Tax purposes. *Rothensies* v. *Fidelity-Philadelphia Trust Co.* (3d Cir.), 112 F. (2d) 758; *Legg's Estate* v. *Commissioner of Internal Revenue* (4th Cir.), 114 F. (2d) 760; *Estate of Gertrude Bucknell Day*, 44 B. T. A. 524; *Lewis Spencer Morris, et al., Executors*, 39 B. T. A. 570; *James C. Webster, et al., Executors*, 38 B. T. A. 273.

In *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, *supra*, a resident of Pennsylvania died testate in 1890. He bequeathed to his daughter a share of the income for life from a trust and gave to her a general power of appointment by will as to a similar share of the corpus of the trust. In default of appointment by the daughter, the decedent directed that such share of the corpus of the trust was to be conveyed upon her death to her children, in equal shares, and to the children of any deceased child of hers, *per stirpes*. The daughter, also a resident of Pennsylvania,

died in 1934, and by her will devised and bequeathed the property over which she had power of appointment in trust, to divide the income therefrom into a sufficient number of equal shares and to pay one share of such income to each of her children surviving her or to the issue of any deceased child, *per stirpes*, and one share of such income to her surviving grandchildren and the issue of any deceased grandchild. This distribution of income was to continue until the death of the daughter's last surviving child, at which time the corpus of the trust was to be divided equally among her then surviving grandchildren, *per capita*, and the surviving issue of any deceased grandchild, *per stirpes*. The daughter left her surviving four children, several grandchildren and no issue of any deceased child. Under her will each of her four children took a one-fifth interest for life in the income of the trust and her grandchildren as a class took the remaining one-fifth of the income for the duration of the trust and the whole of the corpus in remainder. No renunciations of the appointments were made.

The United States Circuit Court of Appeals for the Third Circuit held that under the law of Pennsylvania a devisee under a donor's will in default of appointment takes a vested estate under the will of the donor, subject to be divested by the exercise of the power of appointment and that the effect of the daughter's appointment to each of her children of a life estate in the trust property was merely to limit and thus reduce her children's already vested estates under the will of their grandfather. Consequently the Court decided that the value of the life estates of the daughter's children should not have been included in the daughter's gross estate for federal estate tax purposes. In reaching this decision, the Court overruled its prior decision in the *Wear* case and followed what it considered the clear mandate of the Supreme Court in the *Grinnell* case.

The Court stated (112 F. (2d) 762):

> "If the appointee's rejection of the donee's bequest was of controlling importance to the decision in the Grinnell case, as the Collector argues, then the conclusions of the Circuit Courts of Appeals in the Wear and Lee cases, where the appointees did not reject, could have been reconciled with the conclusion of the Circuit Court of Appeals in the Grinnell case, where the appointees did reject; and the fact that the Supreme Court found the respective conclusions to be irreconcilable clearly implies that the question as to the incidence of the appointees' title depended for its solution upon the effect of the donor's and donee's wills under local law rather than upon the voluntary act of the appointees in receiving the property."

The Court in the *Rothensies* case further stated at page 763 as follows:

> "What therefore, of the devise over in default of appointment, remains undivested after the donee's exercise of the power passes under the will of the donor. As the whole includes all of its parts so does a fee embrace all of the estates that may be carved therefrom. Consequently, the effect of Mrs. Hopper's appointment to her children of an undivided one-fifth interest to each in the equitable estate in the property for life instead of an undivided one-fourth to each in the legal estate in fee, * * * was merely to limit and thus reduce the extent of her children's already vested estates under the will of their grandfather and from whose will they derived their title."

In *Legg's Estate* v. *Commissioner of Internal Revenue, supra*, a similar determination was made by the Circuit Court of Appeals for the Fourth Circuit in a case also involving a power of appointment given by the will of a decedent resident in Pennsylvania. In that case decedent's daughter, in the absence of the exercise of the power of appointment, would have taken the entire corpus of a trust created for the benefit of her mother. Under the exercise

of the power, the daughter took an equitable life estate in a part of such corpus. It was held that the value of the daughter's life estate should not have been included in the value of the property "passing" by the exercise of the power. The Court said (114 F. (2d) 765):

> "When the power was exercised by the donee, the result was, not that property passed thereby to Mildred Webster Legg, but that the estate which had previously vested in her was cut down from a fee-simple interest in the whole to an equitable life estate in a part. What was taken away from her by the exercise of the power passed under the power, but not what was left. That had already vested in her under the will of her grandfather, the original donor."

In *James C. Webster, et al., Executors, supra,* and *Lewis Spencer Morris, et al., Executors, supra,* as in the instant case, the Tax Court arrived at similar determinations, where the applicable law was the law of the State of New York.

It seems clear that these cases have correctly interpreted the New York law, which is the same as the Pennsylvania law involved in the *Rothensies* and *Lee* cases.

Section 40 of the New York Real Property Law provides as follows:

> "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

Section 41 of the same Law provides as follows:

> "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

It is therefore apparent that the persons designated by the Will of decedent's father to take in default of the exercise of the power of appointment given to decedent had a vested remainder interest in the trust fund. *Matter of Lansing*, 182 N. Y. 238; *Connolly* v. *Connolly*, 122 App. Div. 492; *Matter of Haggerty*, 128 App. Div. 479, 194 N. Y. 550; *Crackanthorpe* v. *Sickles*, 156 App. Div. 753. Upon the exercise of the power of appointment by decedent, the interests in the trust thus vested in decedent's widow and daughter were cut down to the extent indicated above. *Matter of Lichtenstein*, 177 Misc. 320, 327; *Matter of Harbeck*, 161 N. Y. 211, 218; *Matter of Lansing, supra; Matter of Chapman*, 133 App. Div. 337, 199 N. Y. 562.

The most recent decision by the New York Court of Appeals in this connection is *Matter of Duryea*, 277 N. Y. 310, in which the Court considered the same trusts which were before the Board of Tax Appeals in *James C. Webster, et al., Executors, supra.* The persons designated in the trust instruments in question to take in default of the exercise of the powers of appointment were the decedent's two children. However, decedent appointed one-half of the trust funds to her daughter and the other half to an adopted son, thereby excluding from participation her natural son. In holding that the property passing to the daughter of the donee was not to be included in the donee's estate for New York Estate Tax purposes where the statute imposed a tax on "property passing under a general power of appointment exercised by the decedent by will", the Court said (p. 318):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule to be applied can be reached only by an entire disregard of any intention to elect or what has been termed an election and may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

The opinion of the Court in the *Duryea* case, at page 319, continues as follows:

> "The question is not what Lisa W. Heighe would take if she renounced her rights to take by the appointment made and elected to take under the will of the donor of the power, but rather what she would have taken had the power not been exercised to any extent. In that case she would have taken one-half under the will of the donor. The donee of the power might have said, 'I give to Lisa W. Heighe the share which she would have taken under the will of Ellen W. Duryea and to Baronig Baron the share which Robert H. Heighe would have taken.' That would have been a good appointment, would have precluded Robert H. Heighe from taking a share in the trust estate under the Duryea will and would have given to Lisa W. Heighe exactly what she would have taken under the Duryea will had no appointment been made. While the donee of the power did not mention the fact that such was the disposition she was making of the fund, it is entirely clear that such was the intent and effect of the appointment made."

In *Matter of Canda*, 114 Misc. 161 (reversed on other grounds, 197 App. Div. 597), the Court held that where the decedent by her will exercised powers of appointment in favor of her trustees with life estates to her children and the transfer to the children was part of what they would have received under the wills of their ancestors if the powers had not been exercised, the appraiser erred in including the value of the life estates as taxable. In *Matter of Lichtenstein*, 177 Misc. 320, the persons who would have taken in default of the exercise of the power of appointment received under the exercise thereof interests in the property deferred until they reached specified ages and it was held that the appointees took under the will of the donor of the power. It is accordingly well settled under the New York law that where a person who would have taken in default of the exercise of the power takes less under the exercise of the power, even though his interest in default would have been a fee simple and his interest under

the exercise of the power is in trust, the interest is taken under the will of the donor of the power and is not subject to tax in the estate of the donee.

In the Circuit Court of Appeals Judge Frank based his opinion solely upon the fact that there had been no renunciation by decedent's widow and daughter of their rights under the exercise of the power and no election by them to take under the will of the donor, stating that it seemed clear to him that such renunciation was necessary under the decision of this Court in *Helvering* v. *Grinnell, supra.* Judge Hand, in his concurring opinion, disagreed on this point with Judge Frank, whose decision, as stated by him, is in conflict with the decisions of the Third and Fourth Circuit Courts of Appeals in the *Rothensies* and *Legg* cases, *supra.* Judge Hand based his opinion upon two circumstances: "first, the life estates to the wife and daughter were equitable, not legal; and second, Peter, who was not a legatee in default, was an appointee, while Henry III, who was not an appointee, was a legatee in default." In so doing, Judge Hand has entirely ignored the well-settled law of New York, as enunciated in the *Duryea, Canda* and *Lichtenstein* cases, *supra,* and his decision is in conflict with the decisions of the Circuit Courts of Appeals for the Third and Fourth Circuits in the *Rothensies* and *Legg* cases, *supra.*

Conclusion.

In view of the conflict in the cases and the errors made by the Court below it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY, and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS

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October, 1943.

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Circuit Court of Appeals (R. 113) is reported at 135 F.(2d) 35. The opinion of the Tax Court of the United States (R. 25) is unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 122). The petition for a writ of certiorari was filed May 20, 1943, and granted June 21,

1943 (R. 123). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

Statement of the Case

All of the facts herein have been stipulated (R. 25, 46-50).

Henry H. Rogers died on July 25, 1935, a resident of Southampton, Suffolk County, New York, leaving a Will (R. 60-76) which was duly admitted to probate by the Surrogate's Court of said County and State on October 28, 1935 and on which letters testamentary were duly granted on the same day to Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company (R. 46).

The father of said decedent, Henry H. Rogers, Sr., died on May 19, 1909, a resident of the City, County and State of New York, leaving a Will (R. 53-59) which was duly admitted to probate by the Surrogate's Court of said County and State on May 28, 1909. By said Will, Henry H. Rogers, Sr. created a trust for the benefit of his son, consisting of one-fourth of his residuary estate. His Trustees were directed to apply the income of said trust to the use of said son until he should attain the age of forty years, and at that time to convey to said son one-half of the principal of said trust. Decedent attained the age of forty years on December 28, 1919 and shortly thereafter the share of said trust to which he then became entitled was paid over to him. The Will of Henry H. Rogers, Sr. further provided that the Trustees should apply the income of the remaining one-half of said trust to the use of said son during his lifetime and upon his death that they should "convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of

real property, according to the laws of the State of New York" (R. 46-47).

By Articles Twelfth and Sixteenth of his Will, decedent exercised the power of appointment over the balance of said trust (R. 47). It was determined by decree of the Surrogate's Court of the County of New York, dated January 12, 1939 (R. 77-110), that 6.667% of the corpus of said trust had been validly appointed under Article Sixteenth of decedent's Will in equal shares outright to decedent's widow, Pauline V. Hoving, his daughter, Millicent, and his grandson, Peter. It was also determined by said decree that decedent had validly appointed the balance of the corpus of said trust remaining after payment of said 6.667% as follows: One-third thereof under Article Twelfth of his Will in trust for the benefit of his widow; one-third thereof under Article Twelfth of his Will in trust for the benefit of his daughter; and the remaining one-third thereof under Article Sixteenth of his Will outright to his grandson. The question presented herein does not involve in any way the portion of the appointed property which passed to decedent's grandson.

The "heirs at law" of decedent "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of the Will of decedent's father were his widow, his daughter and his son, Henry H. Rogers, Jr., who would have taken decedent's real property in equal shares if he had not left a Will (R. 49). Thus decedent's widow, his daughter and his son, if the power of appointment had not been exercised, would each have taken one-third of said trust outright. Under the exercise of the power of appointment by Articles Twelfth and Sixteenth of decedent's Will, his widow and his daughter each took one-third of 6.667% of said trust outright and each took a life interest in the income of one-third of the balance of said trust. No part of said trust was given to decedent's son.

Using the figures and factors stipulated (R. 49, 50), the values of the life interests of decedent's widow and daughter in said trust as of the date of decedent's death were as follows:

Net value of trust	$8,428,949.60
Less: 6.667% thereof	561,958.08
Balance	$7,866,991.52
One-third thereof	$2,622,330.50
Life interest of widow ($2,622,330.50 x .57143)	$1,498,478.32
Life interest of daughter ($2,622,330.50 x .67383)	$1,767,004.96

It thus appears that decedent's widow and daughter received the following property or estates:

In the case of the widow:

Value of property passing outright	$ 187,319.36
Value of life estate	1,498,478.32
Or a total value of	$1,685,797.68

In the case of the daughter:

Value of property passing outright	$ 187,319.36
Value of life estate	1,767,004.96
Or a total value of	$1,954,324.32

The Board of Tax Appeals (now the Tax Court of the United States and hereinafter referred to as the Tax Court) adopted the stipulation of facts in its entirety, together with the exhibits attached thereto, as its findings of fact (R. 25). It held that the aggregate of $3,640,122 which went to the widow and daughter under the exercise of the power was

less than they would have received had there been no exercise of the power, and accordingly excluded said amount from decedent's gross estate for federal estate tax purposes (R. 26).

The Circuit Court of Appeals for the Second Circuit reversed the order of the Tax Court (R. 122). Two of the Circuit Judges, Frank and Learned Hand, wrote separate opinions (R. 114-122); Judge Chase noted his concurrence in the result without joining in either of the separate opinions (R. 122).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In reversing the decision of The Tax Court of the United States;

2. In failing to hold that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of his wife and daughter under the Will of his father and that no property passed to his widow and daughter under his exercise of the power;

3. In holding that the property or estates of the widow and daughter of the decedent in the trust created under the Will of decedent's father should be included as a part of decedent's gross estate for Federal Estate Tax purposes.

ARGUMENT

The effect of the exercise by decedent of the general power of appointment given to him by his father's Will was to reduce the already vested estates which decedent's wife and daughter had under the Will of decedent's father and, accordingly, no property passed to decedent's widow or daughter under the exercise of the power within the purview of the Revenue Act.

Section 302 of the Revenue Act of 1926, as amended, provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . .
>
> • • • •
>
> "(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ."

The only question this case presents is: Did the property which went to the widow and daughter pass, within the meaning of the Act, under the general power of appointment exercised by the decedent by his Will? No claim has ever been made that the power was not a general power or that it was not exercised.

The legislative history of the above and prior Revenue Acts sheds no light as to the intended meaning of the word "passing." 1 Paul, *Federal Estate and Gift Taxation*, 413-416. Obviously, however, Congress intended, because it so stated in the Act, that the estate tax should attach as the consequence of the exercise of a general power only if the exercised power *passed* the appointed property. Accordingly, "the courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f)." *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 62.

It is submitted that the decisions in the reported cases, except the decision of the Court below in the instant case, establish that the property which went to the widow and

daughter did not *pass* under decedent's exercise of his general power of appointment. The most satisfactory way to review them seems to be to trace the development of the law as applied to varying sets of facts.

Case I

X makes a testamentary disposition of property as follows: in trust with income for life to Y and with a general power to Y to appoint the remainder; in default of appointment, remainder to Y's heirs at law. Y dies leaving A, B and C as his heirs at law. Y makes a testamentary appointment of the remainder in fee simple to A, B and C. They renounce their right to take under Y's will and elect to take under X's will, as in default of appointment by Y.

In 1935 upon substantially the foregoing set of facts, this Court held that the appointed property should not be included in the gross estate of the donee (Y) solely because, within the meaning of the "crucial words" of Section 302(f), no property passed to A, B and C as a result of the exercise of the power by Y. *Helvering* v. *Grinnell*, 294 U. S. 153.

In its unanimous opinion, this Court appeared to rely almost entirely on the appropriate state law to determine whether or not the property passed on the exercise of the power. There, as here, the applicable law was the law of New York. The Court quoted at some length from the leading New York case, *Matter of Lansing*, 182 N. Y. 238 (294 U. S. at 156-158).

The assumption that Congress must have intended that recourse be made to State law to determine whether property passes under the exercise of a power seems required by the circumstance that there was and is no general federal law that governs the passing of property. Property rights and the methods of their transfer are determined under our form of government by the applicable state laws. In *Helvering* v. *Stuart*, 317 U. S. 154, 161, this Court observed:

> "Grantees under deeds, wills and trusts, alike, take according to the rule of the state law."

The federal appellate courts and the Tax Court since the *Grinnell* decision by this Court have viewed local law as determinative. Thus, in *Legg's Estate* v. *Commissioner*, 114 F.(2d) 760, at 763, Judge Parker stated for the Court:

> "* * * questions as to the nature of the power of appointment and as to the property passing by the exercise of the power, must be answered by applying the law of Pennsylvania, as that is the state of the domicile of the donor of the power and the state wherein the property subject to its exercise is situate. * * * And the application of this rule is not affected by the fact that a question of federal taxation is ultimately involved; for while we look to federal decisions as authoritative in interpreting the federal statute imposing the tax, we look to the law of the state as laid down by its courts in determining whether there has been such a transfer of property as is subject to the tax under that interpretation. 'State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.' Morgan *v.* Commissioner, 309 U. S. 78, 626, * * * Leser *v.* Burnet, 4 Cir., 46 F. 2d 756; Dayton & Michigan R. Co. *v.* Commissioner, 4 Cir., 112 F. 2d 627, 630."

And see *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F.(2d) 758, 761.

In its very recent opinion in *Lewis* v. *Rothensies*,— F.(2d)—, decided September 1, 1943, the Court of Appeals for the Third Circuit had occasion to say:

> "Finally, the Collector argues that the meaning of the word 'passing' in Sec. 302(f) presents a question of federal law which should be determined without resort to local law. Of course, the construction of a federal statute raises a federal question. But for a federal court to interpret a word employed in a federal statute as calling for a recognition of property rights as governed by local law which regulates the title thereto is but giving federal effect to the word used. *There is no resort to local law for as-*

certaining the meaning of the word 'passing'. The federal courts, adopting as the legal definition of the word 'passing' the transfer of property rights according to the law of the sovereignty which regulates and secures the title thereto, then necessarily look to the local law to determine what rights have been so transferred." (Italics supplied).

Such an approach on the part of the Courts of Appeals for the Third and Fourth Circuits would not appear to conflict with the holding of the Court in *Morgan* v. *Commissioner*, 309 U. S. 78. One of the leading writers on this subject has said:

> "The only limitations upon the continued control of local property law suggested by the *Morgan* case are: (1) that state law cannot turn into a special power what the traditional terminology * * * would call a general power merely by labeling it 'special'; and (2) that the decision of a state court will no longer be binding *per se* upon federal tax authorities, but must be scrutinized for the answer to the question whether the law on which the decision is based is compatible with the federal definitions."
>
> Paul, *Federal Estate and Gift Taxation*, 430.

The Tax Court has similarly regarded itself as bound by the local law. *James C. Webster*, 38 B.T.A. 273, 289; *Lewis Spencer Morris*, 39 B.T.A. 570, 575; *Gertrude Bucknell Day*, 44 B.T.A. 524.

It is because of the approach of the foregoing cases that considerable emphasis herein will be placed on New York decisions.

Turning then to an application of the law of New York to Case I outlined above, it seems established beyond any doubt that under that law the property would be deemed to pass under the donor's will, not the donee's. *Matter of Lansing*, 182 N. Y. 238; *Matter of Chapman*, 133 App. Div. 337, app. dism. 196 N. Y. 561; *Matter of Duryea*, 277 N. Y. 310.

In the *Lansing* case, the Court stressed the concept that, inasmuch as the person in whose favor the power was exercised was the same person who would take under the donor's will, the donee's appointment "left the title where it was before, and the result is the same as if there had been no power to exercise" (p. 243). Although the Court stated that it sufficiently appeared that the appointee "elected to reject title" from the donee (p. 245), its determination is based only secondarily on this factor.

In connection with this point, Professor Griswold wrote concerning the *Grinnell* decision:

> "There is of course much to be said for this conclusion as a practical matter. It would indeed be an incongruous application of the statute which would make the question of taxability turn solely on whether the donee had in fact exercised the power, when the interests which followed the donee's death were in no way affected by the fact that it was exercised or not. That would make taxation almost wholly a matter of form; for the well informed donee would simply refrain from exercising the power if he wished the takers in default to have the property. Ordinarily, substantial taxes are not so easily avoided, nor so adventitiously incurred. But it may be that the incongruity is in the statute itself rather than in the decision which the Court might have made under it. The *Grinnell* case demonstrates the inadequacy of a statute which applies only to the exercise of a general power, and does not include the consequences of nonexercise as well."
>
> Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harvard Law Review 929, 935.

Thus it appears from the cases and leading comments that where, as under the facts outlined in Case I above, the exercise of the power does not result in a shifting of economic benefits, no property passes on the exercise of the power within the meaning of Section 302(f).

Such a view would not appear to be either unduly technical or dependent on the refinements of the conveyancer's art. On the contrary, it seems to recognize substance rather than form.

Case II

The factual situation is identical to that in Case I above, except that A, B and C do not renounce their right to take under Y's will.

The change of facts in Case II singles out this question: Is a renunciation by the takers under the exercise of the power of appointment a *sine qua non* to the doctrine developed in the New York law and echoed by the *Grinnell* decision? Judge Frank, in his opinion in the instant case, stated that his understanding of this Court's ruling in the *Grinnell* case was "that it was solely the renunciation which avoided tax" (R. 120). This view appears to be incorrect.

This Court did emphasize in its opinion in the *Grinnell* case that no property passed from the decedent where the donees refused to accept his gift. That point, however, does not appear to be the sole basis of the decision.

Professor Griswold has stated:

> "In the *Grinnell* case the appointees expressly elected not to take under the power. It does not seem that this is necessary to the result. If the basis of the case is that nothing 'passed' because the appointee already had an interest which simply was not taken away by the exercise of the power, that consequence is just as true whether the appointee elects or not. This conclusion is fortified by the fact that the Court expressly disapproved of the 'reasoning and conclusions' in two cases where there had been no election. It seems that the Court would rather have distinguished these cases if it had felt that the distinction had any validity."
>
> Griswold, *op. cit.*, at pages 935-936.

Judge Frank's decision does not appear to answer effectively either of the points suggested by Professor Griswold. He does, however, state that some language in this Court's opinion in the recent case of *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, indicates that this Court also believes that the *Grinnell* doctrine applies only in the event of a renunciation (R. 117-118). The answer would seem to be that the Court was not there presented with that precise question for determination, but referred to the *Grinnell* case merely as an example of how action taken by beneficiaries after their testator's death can have federal estate tax consequences; more simply yet, as Judge Learned Hand remarked in his concurring opinion in the instant case,

> "I cannot see that *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, sheds any light on the question."

To the same effect, see *Lewis* v. *Rothensies* (C. C. A. 3, September 1, 1943) —— F. (2d) ——.

With the exception of Judge Frank, the opinion of the federal appellate judges and of the members of the Tax Court seems to have been that renunciation was not a necessary part of the *Grinnell* doctrine. Thus in *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758, 761, the Court of Appeals for the Third Circuit stated, after referring to the *Grinnell* case:

> "If, therefore, the donee's exercise of the power was ineffectual, it can hardly be that the appointees' rejection of the donee's useless action was of controlling effect in determining whether the property passed in virtue of the donee's exercise of the power. The local law ruled the question as to the passage of the title regardless of the appointees' rejection of the donee's bequest."

To the same effect is *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 765.

The Tax Court's attitude has been that an election to take as in default of appointment under a New York will is a formal matter only and not material. *James C. Webster*, 38 B.T.A. 273; *Lewis Spencer Morris*, 39 B.T.A. 570.

Can it be said that renunciation is a necessary part of the New York rule which was reflected by the *Grinnell* case? It will be remembered that in the *Lansing* case, upon which the Court in the *Grinnell* case relied, a "renunciation" was implied from the fact that the donee resisted the imposition of the tax, but it seems fair to say that the New York court's chief reliance was placed on the following theory:

> "Mrs. McVickar was born before her grandfather died, and upon his death she took a vested interest in remainder, because she was 'a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate,' created in trust for the benefit of her mother. (1 R.S. 723, §13.) It was property which she could convey or devise. (Id. §35.) While she could not take possession until the death of her mother, the state could not deprive her of the property thus vested in her and she needed no consent from the state that her mother might make a will in order to enter into full enjoyment upon the termination of the precedent estate. Her rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." (182 N. Y. 238, 243-244)

The Court of Appeals of New York recently had occasion to say in *Matter of Duryea*, 277 N. Y. 310, 318-19:

> ". . . the true rule to be applied can be reached only by an entire disregard of any intention to elect or of what has been termed an election . . ."

Prior to the *Duryea* case there had been cases which had been substantially identical on their facts with Case II, wherein an express holding had been made that an election was not a necessary part of the *Lansing* doctrine. *Matter of Chapman*, 133 App. Div. 337, 340, app. dism. 196 N. Y. 561; *Matter of Chauncey*, 102 Misc. 378, 381-387; see Note, 52 Harvard Law Review 531.

Underlying these New York decisions is the settled doctrine that the takers in default of the exercise of the power—e. g., the widow and daughter in the instant case—A, B and C in Cases I and II—had vested remainder interests in the trust fund under the donor's will. The takers in default have a vested remainder even though it is subject to divestment by exercise of the power or by death prior to that of the donee of the power or to diminution by the birth of members of the same class. *Connolly* v. *Connolly*, 122 App. Div. 492; *Crackanthorpe* v. *Sickles*, 156 App. Div. 753. Particular support for this proposition has been found in the controlling sections of the New York Real Property Law.[1]

---

[1] Section 40 (formerly Section 30) provides:

> "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

Section 41 (formerly Section 31) provides:

> "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

Again stripping the factor of renunciation down to the ultimate inquiry into the shifting of economic benefits, it seems clear that whether or not renunciation is present makes not a particle of difference. To repeat the point made earlier, since the persons in whose favor the power is exercised take no more than what the donor gave them in default of the exercise of the power, no greater economic benefit is conferred upon them than if the donee had died without exercising the power.

This Court has "often recognized that the realities of the taxpayer's economic interest, rather than the niceties of the conveyancer's art, should determine the power to tax" and has pointed out "the relevance of this principle as a guide to statutory interpretation, where * * * the language of a statute and its statutory history do not afford more specific indications of legislative intent." *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 58, Note 1.

The rejection of the doctrine of renunciation as a determining factor is not, as has been seen above, the result of some nicety of the conveyancer's art. The converse appears to be true. Renunciations are present in some of the cases only because of what has been referred to as "abundant caution." Section 369(c) of the *Restatement of the Law of Property.*

Most simply stated, "they (renunciations) add nothing to what the particular local law otherwise confers." *Lewis* v. *Rothensies, supra.* Mr. Paul has remarked: "No wonder, then, that a stress on the idea of election results in creating new and virtually unsolvable enigmas." Paul, *op. cit.*, 459.

Case III

The factual situation is identical with that in Case II above, except that in his testamentary disposition of the property, Y appoint. 1/3 to A, 1/3 to B, and 1/3 to D, who is not an heir at law of Y (all in fee simple).

The foregoing set of facts singles out from the facts in the instant case this question: Is the non-inclusion of the donee's son who would have shared equally with the donee's widow and daughter under the will of the donor in default of the exercise of the power, and the appointment of the son's share to the grandson, a stranger under the default provision of the donor's will, a sufficient reason to hold that therefore the widow and daughter cannot be deemed to take under the will of the donor?

In his opinion herein, Judge Hand answered the foregoing question in the affirmative (R. 121-122). However, he did not look to the law of New York for his answer, and he did not correctly assay the donee's purpose.

The law of New York is clear on this point. In *Matter of Duryea*, 277 N. Y. 310, the Court passed on the facts presented by Case III. There the persons designated by the donor to take in default of the exercise of the powers of appointment were the donee's two children. The donee appointed one-half of the trust funds to one child, Lisa W. Heighe, but excluded the other, Robert H. Heighe; the other half of the trust funds was appointed to a stranger under the donor's default provisions, Baronig Baron.

On these facts the Court of Appeals stated:

> "The question is whether Lisa W. Heighe, under the peculiar facts of this case, did take the share she would have taken under the will of Ellen W. Duryea. It is contended on the part of the appellants that she took more under the power of appointment than she would have taken by an election to take under the will of Ellen W. Duryea. Conceding the validity and

effectiveness of the appointment of half of each of the funds to Baronig Baron, it is said that if she renounced her appointment only half of the two funds would remain to be distributed under the Duryea will and the one-half would be required to be divided between Lisa W. Heighe and the appellant, Robert H. Heighe.

* * * *

"The question is not what Lisa W. Heighe would take if she renounced her rights to take by the appointment made and elected to take under the will of the donor of the power, but rather what she would have taken had the power not been exercised to any extent. In that case she would have taken one-half under the will of the donor. The donee of the power might have said, 'I give to Lisa W. Heighe the share which she would have taken under the will of Ellen W. Duryea and to Baronig Baron the share which Robert H. Heighe would have taken.' That would have been a good appointment, would have precluded Robert H. Heighe from taking a share in the trust estate under the Duryea will and would have given to Lisa W. Heighe exactly what she would have taken under the Duryea will had no appointment been made. While the donee of the power did not mention the fact that such was the disposition she was making of the fund, it is entirely clear that such was the intent and effect of the appointment made. It must, therefore, be held that Lisa W. Heighe takes no more under the appointment than she would have taken had no appointment been made and the principle set forth in the cases above cited is applicable, namely, that she is deemed to take under the will of the donor rather than under the appointment made by the donee."

Matter of Duryea, supra, 318-320.

The result reached in the *Duryea* case followed the law established by the earlier New York cases. *Matter of Slosson*, 216 N. Y. 79; *Matter of Ripley*, 122 App. Div. 419, aff. 192 N. Y. 536.

In *James C. Webster*, 38 B. T. A. 273, the Tax Court passed on the federal estate tax consequences of the *Duryea* case noted above. In an opinion which was reviewed by the Tax Court, it was stated (at page 289):

> "We regard the conclusion of the New York Court of Appeals as determinative of property rights 'under established principles of law' and as controlling here on the point of whether Lisa Heighe received the same property rights under the power as under the will of the donor of the power . . . We conclude, therefore, that no property passed to Lisa Heighe when decedent exercised the power of appointment because the exercise of the power left her property rights just as they were before."

Judge Hand referred to the Restatement of the Law of Property but did not indicate that it was opposed to his view. Section 369, Illustration 5.

Even if the New York law be held not controlling, it is persuasive authority to support a holding that the property taken by the widow and daughter in the instant case should still be deemed to pass under the donor's will even though the grandson admittedly took from the donee. Certainly it appears that the donee's intention was to have the property pass in the same shares as would have resulted under the donor's will except that he intended the son's share to go to the grandson, and the wife's and daughter's shares to be held in trust for them.

Again, it appears that even under Case III, no greater economic benefit passed to the widow and daughter than they would have received in the admittedly tax free situation where the power had not been exercised at all.

Case IV

The factual situation is identical with that in Case III above, except that Y appoints one-third of 6.667% of the trust fund outright and a life interest in one-third of the balance thereof to A and to B; and he appoints the remaining one-third of the balance as well as of the 6.667% thereof outright to D.

With Case IV, we reach the facts of the instant case. For it involves the exercise of a general power where no renunciation is made, where part of the fund is appointed to a stranger who would not have taken under the donor's default provisions and where two of the three parties who would take in fee under a default are appointed a much smaller fee interest and a life interest in trust.

Judge Learned Hand in his concurring opinion pointed to the change in the nature of the estates taken by the widow and daughter—life interest in trust instead of a fee interest—as a further reason why "it cannot be said that they took under the will [of the donor]" (R. 121). Here too the premises of his conclusion appear unsound. Just as in deciding the effect of the one-third appointment to the grandson instead of the son, discussed above, he ignores the answer which the courts of New York have made as to the effect of the creation of the life estate. Further, he appears to be viewing the argument as one concerning whether or not the general power of appointment was exercised. Thus, he states:

> "* * * there was no way other than by exercising the power that the donee could have changed the jural quality of what passed to his wife and daughter under the will." (R. 120)

This statement may be entirely correct but it is not directed to the question presented, namely, whether any additional

economic benefits (any property) passed to the wife and daughter by the exercise of the power.

It is, we believe, legally and mathematically obvious that a life interest in the income of property in trust is a lesser interest than a fee simple interest in the same property. Thus, in the instant case, what the widow and daughter received was a lesser interest than they would have received under the donor's will in default of appointment.

The courts of New York have repeatedly held that where the taker receives the same *or a lesser interest* from the donee he takes his title from the donor. In *Matter of Duryea, supra*, the Court of Appeals stated (277 N. Y. 310 at 318-319):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule * * * may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original Will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

In *Matter of Tuckerman*, 130 Misc. 806, at 808, Surrogate Foley thought it well settled that "as the appellants received less under the will of the decedent than they would take under the deed and will of the donor, the exercise of the power is ineffectual, and the property passes under the donor's will and deed." To the same effect, see *Matter of Vanderbilt*, 163 Misc. 667 at 669-670.

The recent case of *Matter of Lichtenstein*, 177 Misc. 320, appears closely in point. There the Surrogate declared (at pages 326-327):

> "The holding that the appointment is valid makes necessary consideration of the consequences flowing from the fact that the appointees take less under it than they would have taken if the power had not been exercised at all. Obviously they take less since they are deferred in possession of capital (until they reach

specific ages) under the appointment, whereas under the donor's will they would have taken in possession immediately on the donee's death, failing exercise by him of the power to appoint. * * * The precise question, however, was considered by the Federal courts (*Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758; *Legg's Estate* v. *Commissioner of Internal Revenue*, 114 id. 760). In each of these cases it was held that the appointment of an equitable estate under a general power to appoint a fee permitted the appointee to take in the donor's estate. These cases are discussed in 41 Columbia Law Review (pp. 149-155). The principle applied in these Federal cases is that if the gift to the appointee is within the compass of the gift authorized by the donor of the power the legatee may take it in the donor's estate though it does not match precisely the terms of the alternative gift by the donor. That a general power includes a power to appoint an equitable estate has been settled in this department in *Matter of Hart* (262 App. Div. 190). On these authorities the court holds that the appointees may take in the donor's estate."

In *Matter of Canda*, 114 Misc. 161, reversed on other grounds, 197 App. Div. 597, the court held that where the donee's exercise of her powers of appointment was in favor of her trustees with life estates to her children and where the transfer to the children was part only of what they would have received under the donor's will in default of exercise, the appraiser erred in including the value of the life estates as taxable.

Conversely, it has been declared to be the law of New York that "where under the will of the donee additional benefits are derived by his appointees, the property passes under that will . . .". *Matter of Taylor*, 121 Misc. 7, 8, citing authorities. What "additional benefits" can it be said that the widow and daughter received in the instant case? The fact is that the bundle of rights provided for them by the donor was very materially diminished by the donee.

The Courts of Appeals for the Third and Fourth Circuits recently passed on closely similar fact situations where life estates were carved out of fee interests by appointments governed by the law of Pennsylvania, but reached a conclusion opposite to the Court of Appeals in the instant case. In *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, the Circuit Court of Appeals for the Third Circuit stated (112 F.(2d) at p. 763):

> "What therefore, of the devise over in default of appointment, remains undivested after the donee's exercise of the power passes under the will of the donor. As the whole includes all of its parts so does a fee embrace all of the estates that may be carved therefrom. Consequently, the effect of Mrs. Hopper's appointment to her children of an undivided one-fifth interest to each in the equitable estate in the property for life instead of an undivided one-fourth to each in the legal estate in fee, * * * was merely to limit and thus reduce the extent of her children's already vested estates under the will of their grandfather and from whose will they derived their title."

In *Legg's Estate* v. *Commissioner of Internal Revenue*, the Circuit Court of Appeals for the Fourth Circuit said (114 F.(2d) at p. 765):

> "When the power was exercised by the donee, the result was, not that property passed thereby to Mildred Webster Legg, but that the estate which had previously vested in her was cut down from a fee simple interest in the whole to an equitable life estate in a part. What was taken away from her by the exercise of the power passed under the power, but not what was left. That had already vested in her under the will of her grandfather, the original donor."

The foregoing decisions are in conflict both as to their reasoning and their conclusions with the Circuit Court of Appeals' decision in the instant case. For a very recent

consideration and rejection of the views of the Second Circuit, see *Lewis* v. *Rothensies, supra.*

In conclusion, it is submitted that viewing the real effect of the exercise of the power, rather than its form, no economic benefits were here shifted to the widow and daughter that would not have been shifted to them had the donee failed to exercise the power.

If dissatisfaction is expressed with the result being urged here, namely, a smaller estate tax than the Commissioner has sought, is not the answer that the remedy is legislative? That is, may it not be that, as suggested by Professor Griswold (page 10, *supra*), the incongruity, if indeed there is one, is in the statute itself? What the Commissioner in effect appears to be seeking is the inclusion of the appointed property wherever a general power has been exercised. The difficulty with that view, as noted by this Court in the *Grinnell* case, is that it seeks a virtual obliteration of "passing" from the "crucial words" of Section 302(f).

Congress completely revised the power of appointment section in the Revenue Act of 1942. While the new law requires the inclusion in the estate of a decedent of all property over which he has a power of appointment at death, whether or not exercised and whether or not "general" or "special" in scope, such a power does not include a power to appoint to the spouse of the donor, to descendants of the donor (other than the donee), to the spouse of the donee, to descendants of the donee, or to charities. The new law further permits the release of a general power of appointment in part so as to restrict its exercise to the class of persons mentioned. Thus, if decedent had died while the present provisions of the Internal Revenue Code were in force, he could have released the power to appoint to all persons other than descendants of the donor and their spouses and exercised the power in question, as he did, without the imposition of any tax upon his estate, as compared with an admitted tax under the old law on property

of the value of $4,788,837.60. Even under present-day thinking, the instant case does not present an example of tax evasion.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit was in error and should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY, and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I

This Court should not delete from the statute the stated requirement that property must *pass* under the exercise of a power to be taxable and substitute the respondent's "effective exercise" theory.

While the basic arguments made by Respondent in Point I of its Brief have been met in our main brief, certain statements seem to justify a summary appraisal.

Respondent states:

> "It is our position that the 'passing' requirement of the statute is satisfied where there is an *effective* exercise of the power." (p. 18).

This is an attempt to reduce what this Court in its *Grinnell* decision termed the "crucial words" of Section 302(f) to (1) the existence of a general power and (2) its exercise. It denies to "passing" any meaning other than what any reasonable reading of "exercise" would achieve. It conflicts with what this Court stated in the *Grinnell* case:

> "The tax here does not fall upon the mere shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method —namely, by their '*passing* under a general power of appointment', and not otherwise. Acceptance of the Government's contention would strip the italicized word of all meaning." (294 U. S. 153, 156).

It also tends to ignore the fact that "the Courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f)", *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 62.

Respondent states concerning Section 302(f):

> "'Passing under' had no particular significance but was simply the best connecting phrase that readily occurred." (p. 21).

This assertion is directly contrary to the cases cited above and is without support. Nor is there any particular relevance to the various other matters discussed in Respondent's wholly theoretic development of Congressional intent in the premises (pp. 18-28). For example, it is interesting to note that Respondent feels constrained to look as far as English law on a distinctly different phase of the law of powers for support for his reading of the statute; indeed, he refers to a 1939 English decision as apparently intended to be relevant to what Congress intended in statutory language which first appeared in 1918.[1] The short answer is

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[1] See Respondent's Brief at page 28 for its reference to *In re Brook's Settlement Trusts* (1939) Ch. 993. The pertinent language of Section 302(f) first appeared in Section 402(e) of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

that the legislative history sheds no light as to the intended meaning of "passing" (Petitioner's Main Brief, p. 6).

Respondent cites the *Hallock*[2] and *Clifford*[3] decisions of this Court to support the proposition:

> "The inquiry whether by local interpretation there is a 'passing' of property under the exercise of a power or under the instrument creating the power is precisely the type of question which has been banned from the interpretation of federal tax statutes by the recent decisions of this Court." (p. 32).

However, viewing those decisions as holding that substance rather than form must control in the interpretation of the federal tax statutes, the irreducible fact is that our view is in accord with their holding. Thus, as a matter of substance rather than form, no greater economic benefit shifted to decedent's widow and daughter than would have been shifted to them had he failed to exercise the power, which latter event was admittedly intended by Congress to be tax-free. Certainly, Respondent's argument that ". . . the failure of the instant appointees to renounce is decisive" (p. 41), looks only to form and ignores substance. In many cases, it would permit the determination of tax liability by the whim of the recipient of the property.

To seek, as does Respondent, to substitute an analysis of "quantitative" and "qualitative" changes of interest for the clear-cut one of whether or not the donee's will confers additional benefits upon the appointees (as compared to what they would take in default) is to prefer form to substance. This is so whether the answer to the question whether anything passed as a result of the exercise of the power is thought to be solely a federal question or one determinable under the state law.

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[2] *Helvering* v. *Hallock*, 309 U. S. 106.

[3] *Helvering* v. *Clifford*, 309 U. S. 331.

Indeed, it would be an anomaly in the law if a tax were not payable where the interests taken under the exercise of the power were the same as in default of exercise but a tax was payable where a lesser interest was so taken.

II

Under the applicable State Law no property passed to the wife and daughter of the decedent by reason of the exercise of the power.

Respondent (Brief, p. 51) takes the position that the State tax cases relied upon by Petitioners "are a poor vehicle for the determination of property law, since they involve public interests which rightly tend to obscure the precise distinctions which may be appropriate in adjudicating claims between individuals." We have shown in our main brief that entirely apart from any question of taxation the New York statutes and cases are clear as a matter of property law that the interest of a person designated to take in default of the exercise of a power of appointment is a vested interest. See *Matter of Chapman*, 133 App. Div. 337, aff'd. 199 N. Y. 562. That questions concerning such interests have arisen in cases involving taxes more frequently than in any other type of case does not in any way impair the conclusiveness of the authorities. The suggestion that the New York courts would announce one property rule in cases dealing with taxation and another in cases involving property rights seems baseless.

Also at page 51 of his brief, Respondent endeavors to buttress, by the citation of New York authorities, Judge Hand's holding in the court below to the effect that since the life estates appointed to decedent's wife and daughter were equitable and not legal, they must be included in the donee's estate for estate tax purposes. None of the cases cited by Respondent were relied upon by Judge Hand, or

support his determination. None use Respondent's phraseology of "quantitative" and "qualitative" changes of interest.

With respect to *Matter of Cooksey*, 182 N. Y. 92, the New York Court of Appeals in *Matter of Lansing*, 182 N. Y. 238, said (p. 247):

> "It, therefore, became necessary for the grandchildren to claim under the power of appointment as exercised by their mother in order to come into the possession of the largest sums mentioned at the ages named."

The *Cooksey* case is also cited by the New York Court of Appeals in *Matter of Duryea*, 277 N. Y. 310, 318, for the following proposition:

> "That an appointment to a stranger or an appointment through which the appointee takes benefits greater than would have accrued in the absence of an appointment is taxable in the estate of the donee of the power where the power is absolute is well established by authority. (*Matter of Cooksey*, 182 N. Y. 92; *Matter of Delano*, 176 N. Y. 486.)"

It is therefore clear that under the exercise of the power of appointment in the *Cooksey* case greater economic benefits passed to the appointees than they would have received had the power not been exercised.

In *Matter of Dows*, 167 N. Y. 227, aff'd sub nom. *Orr* v. *Gilman*, 183 U. S. 278, there was no contention made that the donee's sons received less under the exercise of the power than they would have otherwise and it clearly appeared that they received more. In *Matter of Rogers*, 71 App. Div. 461, aff'd 172 N. Y. 617, the appointee received the appointed estate outright under the exercise of the power of appointment, whereas in default of appointment he would have taken merely a life estate. Here again there was no contention made that the appointee received less under the exercise of the power. In *Matter of Warren*, 62 Misc. 444,

it appeared that under the will of the donor the four children of his son would have taken the estate equally if the power had not been exercised. Under the exercise, the wife of the donee was given a life interest and upon her death the principal was appointed to the donee's three sons to the exclusion of a daughter of the donee. The opinion does not reveal whether greater economic benefits passed to the three sons of the donee by the exercise of the power than they would have taken if the power had not been exercised, but it is reasonable to assume, in view of the facts, that greater economic benefits did pass by the appointment. The exact determination of the court in *Matter of Lowndes*, 60 Misc. 506, is not clear. The proceeding was evidently instituted to fix the New York transfer tax in the estate of the donor of the power, the donee having been a non-resident of New York. Although it was held that the children of the donee of the power took under their mother's will rather than under that of the donor of the power, a transfer tax was determined to be payable in the estate of the donor of the power. It is to be noted that the court relied upon the *Cooksey* case, but did not refer to the *Lansing* case nor to the statement of the Court in the *Lansing* case regarding the effect of the *Cooksey* case.

As to certain language contained in *Matter of Rynear*, 130 Misc. 804, and *Matter of Chapman*, 133 App. Div. 337, to which we assume the Respondent refers by his citation of those cases, it should be noted that the facts there before the courts did not require a determination as to the effect of an appointment of equitable estates where legal estates would have been taken in default of the exercise of the powers. Furthermore, it must be borne in mind that Surrogate Foley who decided *Matter of Rynear* had some years previously decided *Matter of Canda*, 114 Misc. 161, 164, in which he had found no difficulty in holding that interests which were qualitatively different under the exercise of a power than they would have been had the power not been exercised were not subject to tax.

It is significant in this connection that Respondent follows Judge Hand in the court below in disregarding (except to mention it in a footnote) the leading New York case of *Matter of Duryea*, 277 N. Y. 310, from which we have quoted extensively in our main brief. In that case the New York Court of Appeals said (pp. 318-319):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule * * * may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original Will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

The power of appointment provisions of the Internal Revenue Code as amended by the Revenue Act of 1942 (Section 811(f)(2)(A)) contain no reference to qualitative or quantitative estates but in a recent ruling of the Treasury Department by D. S. Bliss, Deputy Commissioner (Prentice-Hall Federal Tax Service par. 23,848), the following is set forth:

> "It is the opinion of this office that a power of appointment which is exercisable only in favor of persons or objects within the excepted class of the statute as referred to above properly falls within such excepted class if such power is exercised by creating a trust, in favor of the persons or objects within the excepted class."

However, if the Court should agree with Judge Hand that the equitable estates of decedent's widow and daughter must be included in his estate for estate tax purposes, there should nevertheless be excluded the value of the property appointed outright to the widow and daughter, viz.: $374,638.72.

III

The interest in the trust property remaining in the daughter was not as great as it would have been if the power had not been exercised.

Respondent asserts that the interest appointed to decedent's daughter is greater than the interest she would have taken had the power not been exercised, claiming that the Tax Court failed to take into account the value of the daughter's contingent interest in the principal of the widow's trust. As stated in our main brief, it is submitted that the value of the interests passing to decedent's daughter under the exercise of the power amounted in the aggregate to $1,954,324.32 and included the portion of the fund which she took outright and the value of her life interest in one-third of the fund less 6.667%. This is the value found by the Tax Court, which also found that the daughter's interest if the power had not been exercised would have amounted to $2,809,649.86. These values were not questioned by the Circuit Court of Appeals. To the value found by the Tax Court, Respondent has added the sum of $864,923.27, alleged to be the value of the daughter's remainder interest in the widow's trust. It is stated that this result has been obtained by using a factor to arrive at such value which is based on the likelihood mathematically of a person of the age of thirty-three years surviving a person of the age of forty-five years. In so doing, Respondent has entirely ignored the fact that decedent's daughter, even though she survives decedent's widow, may not be the only person to share in the remainder of the widow's trust. In Article Twelfth of his Will (R. 63) decedent provided that upon the death of his widow the principal of her trust should go to his "issue surviving her, except Henry, per stirpes and not per capita." Contrary to Respondent's contention, this language does not exclude from participation any children who may be born

to decedent's son Henry and who may survive the widow. This is specifically provided for in Article Fifteenth of decedent's Will (R. 69-70) where he stated that his son Henry was to be excluded from any remainder interest bequeathed to decedent's issue "as though he (Henry) had not survived me." This is a definite statement of decedent's intention not to exclude descendants of his son. Under these circumstances the cases cited by Respondent are meaningless.

Accordingly, any descendants of decedent's son will take an equal one-half share with decedent's daughter, if both survive the widow, of the remainder of the widow's trust. So far as is known it is impossible to compute the probability of the son having children who may survive the widow. If it were possible of mathematical computation, a factor taking into consideration this contingency should be used, instead of the factor employed on page 57 of Respondent's brief, which has not been stipulated and is not a part of the record.

Respondent further urges that since one-half of the principal of the widow's trust was to pass immediately to the daughter in the event of the widow's remarriage, the value of the daughter's appointed interest should be further increased and the value of the widow's appointed interest should be reduced so as to take into account the possibility of the widow's remarriage. It is clear that at the date of decedent's death the interest of the widow could only be reduced by her later remarriage and the interest of the daughter in the trust for the widow was conditioned upon such remarriage and upon the daughter then surviving. The law is well settled that the taxable status of decedent's property must be determined at the time of his death unaffected by any subsequent happening which does not relate back to the date of death.

Humes v. *U. S.*, 276 U. S. 487;
Ithaca Trust Co. v. *U. S.*, 279 U. S. 151;

George E. Farrington, et al., Executors, 13 B.T.A. 274, aff'd. 30 F. (2d) 915, cert. den'd 279 U. S. 873;
George W. Davison, Executor, 31 B.T.A. 101, aff'd. 81 F. (2d) 16;
Estate of Ida Simpson, 41 B.T.A. 157.

There is probably no known method of determining at decedent's death the value of the possibility of the widow remarrying, a contingency over which the widow alone had control.

Humes v. *U. S.*, 276 U. S. 487, 494.
Robinette v. *Helvering*, 318 U. S. 184.

It is submitted that the interest of the widow is as computed in our main brief and that the only interest of ascertainable value which the daughter received at the date of decedent's death is as set forth in our main brief. Accordingly, there would appear to be no necessity of remanding the case for further proceedings as suggested by Respondent.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1036

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The Commissioner of Internal Revenue believes that the decision of the Circuit Court of Appeals is correct but acquiesces in the petition for certiorari.

The Circuit Court of Appeals was unanimous as to the result although not as to the reasons which impelled it (R. 114–122), Judges Frank and L. Hand writing separate opinions and Judge Chase concurring in the decision without indicating his individual views. Judge Frank believed

that, under *Helvering v. Grinnell*, 294 U. S. 153, the failure of the beneficiaries to renounce the appointment was the decisive factor, and that comparison of the interests taken under the appointment with the interests which would have been taken in default of appointment was therefore unnecessary. Judge L. Hand rejected the failure to renounce as controlling and believed the decisive factor to be that the interests of the beneficiaries under the appointment were materially different from what they would have been in default of appointment.

We believe that each of the alternative grounds stated in these opinions adequately supports the decision reached. It is our position, first, that the exercise of a general power of appointment, coupled with a failure to renounce on the part of the beneficiaries, requires, without more, the inclusion of the appointed property within the gross estate of the donee of the power, under Section 302 (f) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended. It was the fact that the beneficiaries did renounce which appears to have been decisive in the *Grinnell* case, particularly when read in the light of *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 65. But if failure to renounce does not suffice in all circumstances, it then becomes necessary to compare the interests appointed with the interests which would otherwise have been taken. Where, as here, the exercise of the power

is effective to disturb the flow of benefits, the case necessarily falls within the statute. Even were it true, as cannot be established in the present case, that for certain purposes state property law treats the interests as having vested under the will of the donor of the power, and treats the exercise of the power as merely carving lesser interests out of the former, this would be immaterial. The operation of Section 302 (f) does not turn on such technicalities of local law. See *Morgan* v. *Commissioner*, 309 U. S. 78. Nothing in the *Grinnell* case establishes the contrary.

The taxpayer urges, to the opposite effect (Br. 13–16), that the law of New York does control, and requires a decision in its favor. Under this view, it is not plain that the decision below is in conflict with *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758 (C. C. A. 3d), or *Legg's Estate* v. *Commissioner*, 114 F. 2d 760 (C. C. A. 4th), since the estates involved in these cases were controlled by the law of Pennsylvania rather than of New York. We think, however, that the foregoing decisions are broadly in conflict with the decision below.

Section 403 of the Revenue Act of 1942, c. 619, 56 Stat. 957, has prospectively amended the Internal Revenue Code so as to make decisive the possession of a power of appointment rather than its exercise. There are, however, several other cases now in litigation arising prior to the 1942

amendment which involve the same point as the instant case, and we are informed that there are many more such cases pending in the Bureau of Internal Revenue. The amounts involved aggregate several millions of dollars.

Accordingly, while we think that the decision below is correct, the existence of a substantial conflict and the importance of the problem make appropriate the granting of a writ of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JUNE 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, DECEASED, ADRIAN H. LARKIN, ALBERT STICKNEY, AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 25–27) is unreported. The opinions in the Circuit Court of Appeals (R. 113–122) are reported at 135 F. 2d 35.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1943 (R. 122). Petition

for a writ of certiorari was filed May 20, 1943, and was granted June 21, 1943 (R. 123). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under his father's will, the decedent, Henry H. Rogers, enjoyed the income of certain trust property for life and possessed a general testamentary power of appointment with respect to it. In default of appointment the property at decedent's death would have gone to his widow, son, and daughter outright in equal shares. Decedent exercised the power by will, appointing (1) one-third of the property outright to a grandson, (2) 6.667 percent of a one-third share outright to his widow and the balance of this share in trust to pay the income to her, and upon her remarriage to pay over one-half of the corpus, and upon her death, the balance of it, to his daughter, if then living, and (3) 6.667 percent of the remaining third to the daughter outright, and the balance in trust to pay the income to her for life, and at her death to pay over the corpus to her then surviving issue. The question is whether the value of the property appointed outright to the widow and the daughter and the value of their respective interests as beneficiaries of the income of the trusts should be included in the

decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended.[1]

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are set forth in the Appendix, *infra*, pp. 61–63.

STATEMENT

The stipulated facts, which were adopted by the Board of Tax Appeals (R. 25), may be summarized as follows:

The decedent, Henry H. Rogers, died July 25, 1935, a resident of New York. The petitioners are the duly qualified executors under his will, letters testamentary having been granted to them by the Surrogate's Court of Suffolk County, New York, on October 28, 1935. (R. 46.) Under the will of his father, Henry H. Rogers, Sr., who died a resident of New York in 1909, decedent was given the income from certain property which was placed in trust. One-half of the corpus was to be distributed to him when he became 40 years

[1] It is not disputed that the one-third share appointed to the grandson and the interests appointed to follow the interests of the widow and daughter, respectively, as beneficiaries of the income of the trusts fall within the decedent's gross estate (R. 50). In referring hereafter to the trust interests or trust estates of the widow and daughter we refer only to their interests as income beneficiaries during the period of the trusts, unless the text states otherwise. Thus, we do not include by these expressions the contingent interest of the daughter in the corpus of the widow's trust, which petitioners do not deny must be included in the gross estate.

of age; the balance was to remain in trust until decedent's death and was then to be paid over to such persons or corporations and in such manner as decedent in his last will might appoint, or, in the absence of appointment, to such persons as should then constitute his heirs at law as in the case of the inheritance of real property under the laws of New York. (R. 46–47, 56–57.) Decedent became 40 years of age in 1919 and half of the corpus of the trust was then paid over to him (R. 47). The balance remained in trust until decedent's death in 1935. Its value at the date of death was $8,428,949.60 (R. 49).

Decedent left surviving him his widow, two children by a former wife—Henry H. Rogers III and Millicent Rogers Balcom—and three grandchildren—Peter Salm and two others, who were the children of Millicent Rogers Balcom (R. 48). Decedent's heirs at law, as in the case of the inheritance of real property under the laws of New York, within the provisions of his father's will, were his widow, Henry H. Rogers III, and Millicent Rogers Balcom. In default of appointment, they would have taken the property subject to the power of appointment outright in equal shares. (R. 49.)

By his will decedent exercised the power of appointment in the following manner: By the Twelfth Article of his will he directed that the property subject to the power of appointment be

held in trust and divided into three equal shares. (1) The trustees were to pay the income from one share to his widow, and upon her death were to pay the principal to the then surviving issue, if any, of his marriage with her (in fact, there was no issue), and otherwise to decedent's "other issue surviving her, except Henry, per stirpes and not per capita."[2] In the event of the widow's remarriage half of the corpus of her trust share was to continue in the trust, but the other half was to be immediately distributed to the remaindermen just named, determined as of the date of the remarriage. (R. 47, 63–65.) (2) The trustees were to pay the income from the second share to the decedent's daughter for life and at her death were to distribute the corpus to her then surviving issue, excepting her son Peter (R. 65). (3) The trustees were to pay the income from the third share to Peter for life and upon his death were to distribute the corpus to his then surviving issue (R. 65–66). Under the Sixteenth Article of the will it was provided that if any trust or part thereof should be held invalid, the corpus of the invalid trust or portion should go outright to the person for whom the equitable life estate had been designated (R. 70).

[2] The ultimate gift over in the absence of surviving issue of the first marriage is not important for present purposes.

By a decree of the Surrogate's Court of New York County entered January 12, 1939, in a proceeding for the judicial settlement of the account of the trustees under the will of Henry H. Rogers, Sr., for the benefit of decedent, it was determined that the trust for Peter and that the trusts as to 6.667 per cent of the shares of the widow and daughter were invalid under New York law. The trusts were otherwise upheld. But the saving clause, the Sixteenth Article of the will, was held to have made outright gifts of one-third of the property to Peter, and 6.667 percent of one-third of the property, in each case, to the widow and to the daughter. The appointment thus did not fail in any respect. (R. 48–49, 92–94.) The value of the 6.667 percent which went outright to the widow and daughter was $187,319.36 as to each (R. 50).

The decedent's widow was 45 years old at the date of his death. She remarried about two years later, on April 30, 1937. Decedent's daughter, Millicent, was 33 years old at the date of his death. (R. 48.) The present worth of a life interest in $1 is $.57143 for a person of 45, and $.67383 for a person of 33 (R. 50).

During the administration of the decedent's estate, his widow filed an application in the Surrogate's Court of Suffolk County for a determination of her right under Section 18 of the Decedent Estate Law to elect to take against the provisions of decedent's will, despite a waiver of her right

of election previously executed and filed with decedent's will. The court dismissed the application on July 13, 1936, and its decision was affirmed on appeal. In a proceeding in the Surrogate's Court of New York County, involving the judicial settlement of the account of the trustees under the will of Henry H. Rogers, Sr., for the benefit of the decedent, his son, Henry H. Rogers III filed an answer attacking the legality of the exercise of the power of appointment. The court held against the son's contentions on May 23, 1938. (R. 48.)

The Commissioner determined by his deficiency notice and contended before the Board of Tax Appeals that the value of the entire property subject to the decedent's exercised power of appointment, of the stipulated worth of $8,428,949.60, should be included in his gross estate for estate-tax purposes. The petitioners contended that the value of the property passing outright to the widow and daughter and the value of the respective trust interests appointed to them should not be included in the decedent's gross estate. (R. 50.) The Board determined that the "value of the property passing to the widow and the daughter under the power was $3,640,122" and that this was less than the value of the property which they would have received as donees in default of appointment. On this basis, the Board excluded so much of the value of the appointed property from the decedent's gross estate, and included only the

value of the balance of the property, stated to be $4,788,837.60. (R. 26.)[3]

On the Commissioner's appeal, the Circuit Court of Appeals reversed the Board and held that the entire value of the property subject to the power of appointment was includible within the decedent's gross estate under section 302 (f) of the Revenue Act of 1926, as "property passing under a general power of appointment exercised by the decedent (1) by will * * *." Although the decision was unanimous, Judges Frank and L. Hand each filed separate opinions and Judge Chase concurred in the result without indicating his individual views (R. 114–118, 119–122).

SUMMARY OF ARGUMENT

I

The decedent, Henry H. Rogers, possessed a *general* power of appointment and *exercised* it. The critical question is whether there was a "passing" of the interests in controversy under the exercise of the power within the meaning of Section 302 (f) of the Revenue Act of 1926, as amended.

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[3] The decedent's property, exclusive of the $8,428,949.60 subject to the power of appointment, was in excess of $14,000,000 (R. 49), and the estate tax liability computed in accordance with the Board's opinion is $7,491,556.07 (R. 38). Subject to final computation, the principal amount of tax involved in this controversy appears to be $1,601,653.68.

It may be noted that the value of the balance of the property covered by the power should be $4,788,827.60, rather than the $4,788,837.60 stated.

Petitioners contend that the value of the interests taken by the widow and the daughter under the exercise of the power was less than the value of the interests which they would have taken in default of appointment, and that therefore there was no passing of the property under the power. The Board of Tax Appeals agreed with this view. Under this point, we accept the valuations of the widow's and daughter's interests determined by the Board. It is our position that there was nevertheless a "passing" of all of the property under the exercise of the power. The court below agreed with our view.

A. We contend, first, that the "passing" requirement simply means that the exercise of the power must be effective, and that it is necessarily effective when the exercise is valid in the first instance and the appointees, as here, fail to renounce.

1. In every practical sense there is a passing of the property in these circumstances, since the appointees rely upon the title provided them under the will of the donee of the power. This is demonstrated in the instant case by the fact that the surrogate's decree was based on the construction, not of the will of the donor of the power, but of the will of the donee, the decedent. The disposition of the property made by decedent's father upon his death in 1909 was merely tentative and was dependent upon decedent's wishes upon his death twenty-six years later. It was decedent's

decision, expressed by his will, which effectively disposed of the property.

2. Section 302 (f), as amended, is derived from Section 402 (e) of the Revenue Act of 1918, which first inserted in the estate tax an express reference to powers of appointment. Neither the statute nor its legislative history furnishes any basis for a distinction based upon the identity of the appointees under the exercise of the power. The pertinent Committee Report strongly supports the conclusion that the framers of the original Section 402 (e) were concerned only with the existence of a general power, which they likened to ownership, and the decision of the donee to assert dominion by exercising the power.

3. Nor is there anything in the general law of powers as it existed in 1918, or exists today, which supports the introduction into the statute of an unexpressed distinction based upon the identity of the appointees. The American cases by strong implication, and the English expressly, take the view that the identity of the appointee is immaterial.

4. Petitioners' theory is that a taker in default acquires a vested interest in the property, subject merely to divestment, and that where a taker in default is left under the exercise of the power with something of what he would have taken in default of appointment there is with respect to that interest no passing under the exercise of the power. Under this view, it is asserted that each case is dependent upon the peculiarities of the local law

as to passing. But the question of whether there is a passing of the property under local law is an artificial one, at best. The result will depend in each case merely on the assumptions which are taken as the starting point of the discussion. It is a question unrelated to the substantial rights and interests of the parties. The question whether the "passing" requirement of Section 302 (f) is satisfied is by its nature wholly a federal question, independent of local law. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78.

5. There is nothing in the administrative application of Section 402 (e) and the succeeding provisions which warrants a distinction based upon the identity of the appointees.

6. *Helvering* v. *Grinnell*, 294 U. S. 153, particularly when read in the light of *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, confirms the view that the identity of the appointees is of no consequence and that there is a passing of the property under Section 302 (f) when a general power is exercised and the appointees fail to renounce.

7. Under this view, it may be thought that there is somewhat of an incongruity where, unlike the situation in the present case, the beneficiaries and the interests which they receive under the exercise of the power are precisely the same as in default of appointment. If this be an incongruity, it would seem to inhere in the faulty concept of the statute, which fails to tax unexercised powers, a

defect which has since been remedied by the Revenue Act of 1942.

B. If we are wrong in our contention that the failure of the appointees to renounce, without more, requires the application of Section 302 (f), it then becomes necessary to compare the identity of the appointees and their interests with the identity of the takers in default and the interests which they would have taken. Where, as here, the exercise of the power is effective to disturb the flow of benefits, there is a "passing" of all the property, whatever the importance of a failure to renounce.

The *Grinnell* case in this aspect does not support the petitioners' position at all, for it classifies as ineffective only an exercise which fails to disturb the benefits flowing from the will of the donor of the power. Basically, the considerations discussed under A support, *a fortiori,* the proposition that an appointment which changes the economic benefits brings down the tax. Here there was a modification or rearrangement of such benefits to a most substantial degree, for decedent's son, who would have taken one-third outright in default of appointment, was eliminated entirely, decedent's grandson, who would have taken nothing in default, was given one-third outright, and the interests of the widow and daughter were radically modified.

Indeed, the instant case involves such a drastic change in the flow of benefits that the result

reached by the court below can be supported by the somewhat narrower view that, at the least, where the appointment touches every part of the property, and no part can be pointed to as an unaffected remnant of the default interest, the exercise of the power has been completely effective. There was thus a passing of all the property since the interests taken by the widow and daughter were both quantitatively and qualitatively different from what they would have taken in default.

II

We strongly urge that a wholly federal test of "passing" should be applied; the discussion under Point I is independent of local law in this respect. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78. Even if New York law is to be applied, however, the judgment below must be affirmed as to all except the amount of tax attributable to the relatively small share appointed outright to the widow.

A. The New York cases hold that where the *qualitative* interest appointed to a taker in default is different from the interest which would have been taken in default, there is a passing under the exercise of the power. Under this line of cases, all of the property would be included in decedent's gross estate except the two relatively small shares appointed outright to the widow and the daughter.

B. The New York cases also hold that where the interest appointed to a particular individual is of a greater value than that person would have been taken in default, the exercise of the power is wholly effective. This raises the question of the proper value of the interest taken by the daughter. Contrary to the determination of the Board of Tax Appeals, the valuation of her interest must include a value not only for her own life estate but also a value for her contingent right to the corpus of the widow's trust upon the latter's death. When the value of this interest is added to the valuation determined by the Board, it will be seen that the total value of the interest taken by the daughter under the exercise of the power exceeds the value of the one-third share outright which she would have received in default of appointment. Moreover, if the contingency of the widow's remarriage should be taken into account, the value of the daughter's interest would be further increased. Thus, under this second line of New York cases all of the property passing to the daughter must be included within decedent's gross estate.

The view which this Court takes of the case might conceivably make important a factor not heretofore considered, namely, an exact computation of the value of the interest taken by the widow under the appointment. This would raise

questions as to whether the probabilities of her remarriage may be evaluated and, if not, the consequences so far as the valuation of her interest in the one-half of the trust subject to this contingency are concerned. These questions have an importance beyond the instant case, but neither was touched upon in the opinions of the Board of Tax Appeals or of the Circuit Court of Appeals. Accordingly, if an exact valuation of the widow's interest is considered significant, it would be appropriate to remand the case for further proceedings on this point.

ARGUMENT

I

THE ENTIRE VALUE OF THE PROPERTY COVERED BY THE POWER OF APPOINTMENT SHOULD BE INCLUDED IN THE DECEDENT'S GROSS ESTATE

Henry H. Rogers, who died in July 1935, a resident of New York, possessed a power of appointment given him under the will of his father. The applicable statute is Section 302 (f) of the Revenue Act of 1926, as amended by the Revenue Acts of 1932 and 1934 (Appendix, *infra*, p. 61), which provides that the gross estate shall include the value at the time of the decedent's death of all property "passing under a general power of appointment exercised by the decedent (1) by will * * *." The applicable regulations are Treasury Regulations 80 (1937 ed.), Article 24

(Appendix, *infra*, pp. 62–63). It is not disputed that the decedent undertook to exercise the power of appointment; nor is it disputed that *all* of the property actually passed in accordance with that exercise of the power. Petitioners rely principally upon the purported fact that under the exercise of the power decedent's widow and daughter received interests of a lesser value than either would have received in default of appointment. On this basis, petitioners contend that there was no "passing" of these interests to the widow and the daughter under the exercise of the power. Under Point I, we assume the correctness of the Board's determination as to the value of the interests taken by the widow and daughter. It is our position that there was a "passing" of all of the property covered by the power of appointment under the exercise of the power within the meaning of Section 302 (f), as amended.

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[4] The Board apparently arrived at the valuation of $3,640,122 for the interests of the widow and daughter as follows:

"In the case of the widow:	
Value of property passing outright	$187,319.36
Value of interest in trust	1,498,478.32
Total interests taken by widow	$1,685,797.68
In the case of the daughter:	
Value of property passing outright	187,319.36
Value of interest in trust	1,767,004.96
Total interests taken by daughter	$1,954,324.32

The total interests of the widow and daughter so computed equal the Board's total of $3,640,122. This computation accords with petitioners' contentions (Br. 4). In default

Under the will of his father, absent any action on decedent's part, the property covered by the power of appointment would have gone on decedent's death to the latter's widow, son, and daughter outright in equal shares. But decedent, in addition to receiving the income from the property for life, had it within his power to divert the property from the takers in default and to rearrange the distribution as he might choose. Decedent in fact chose to exercise the power, and did so by his will. In consequence, his son was eliminated entirely and a one-third share was given outright to his grandson, Peter, who would have taken nothing in default of appointment. The interests of the widow and daughter, likewise, were radically changed. There was no renunciation by the appointees.

On these facts, it must be agreed that decedent possessed a *general* power of appointment and that he *exercised* it. It is clear, likewise, that

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of appointment the widow and the daughter, respectively, would have taken outright one-third of the property, or $2,809,649.86. Thus, on the Board's computation, each received less under the exercise of the power than she would have received in default of appointment.

It will be observed that the Board failed to add to the value of the daughter's interest the value of her contingent interest in one-half of the widow's share upon the latter's remarriage and in the balance of the widow's share upon the latter's death. The Board likewise failed to reduce the value of the widow's interest by any amount because of the contingency of her remarriage. We discuss these omissions *infra*, pp. 54–60.

there was no renunciation on the part of the appointees and no election on their part to take under the will of the donor. The controversy centers upon the third requirement of the statute, whether there was a *passing* of the property under the exercise of the power.

A. THE APPOINTEES ACTUALLY SUCCEEDED TO THE INTERESTS APPOINTED TO THEM UNDER THE EXERCISE OF THE POWER; THEIR FAILURE TO RENOUNCE THE APPOINTMENT PRECLUDES THEIR CONTENTION THAT THE PROPERTY DID NOT "PASS" UNDER THE POWER

It is our position that the "passing" requirement of the statute is satisfied where there is an *effective* exercise of the power. There must be a general power, it must be exercised, and the passing requirement imports the further condition that the exercise must be effective. Moreover, where, as here, there is an exercise of a general power, it is our position that the failure of the appointees to renounce removes the only obstacle which might have frustrated the effective exercise of the power. Consequently, we submit that the failure to renounce is decisive and demonstrates, without looking further, that there was a passing of the property under the power.

1. Certainly in every practical sense the exercise of the power was wholly effective and there was a "passing" of all of the property under its terms. The direction of the property to the takers in default provided by the will of the donor of the power, decedent's father, upon his

death in 1909, was merely tentative and was dependent upon decedent's wishes at the time of his death twenty-six years later. In the interim the takers in default received nothing from the property and had no salable interest in it. Even if under local property concepts they had assignable interests, it is evident that no purchaser could be found, for their interests could be utterly extinguished or drastically modified by a stroke of decedent's pen. This, in fact, is precisely what happened.

By the Twelfth and Sixteenth Articles of his will, decedent undertook to control at every point the title to all the property. In order to show good title on any subsequent disposition of the property the appointees manifestly would need to rely upon the detailed provisions of decedent's will for the substantiation of their ownership. The terms of the surrogate's decree alone would seem to make argument as to the source of the appointee's title academic. That decree (R. 92–94) is based on a careful examination and construction of the terms of decedent's will, not of the will of his father. Indeed, decedent's son attacked the exercise of the power and was defeated. *Re Rogers*, 168 Misc. 633.[5]

[5] The Board of Tax Appeals held that there was no passing of the interests in controversy, of a value of $3,640,122, under the power of appointment. However, confronted with the practical problem of recounting what had happened, it is

To argue that there is no passing under an exercise of a power of appointment where there *is* a valid exercise and the appointees by failing to renounce *in fact* rely upon it for the title which they take is obviously to contend for a meaning of "passing" at variance with the natural and reasonable understanding of the language used. It is this position which petitioners must maintain.

2. The phraseology of Section 302 (f) of the Revenue Act of 1926, as enacted and as amended, stems directly from Section 402 (e) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which first brought to the estate tax an express provision as to powers of appointment. In the Committee Report accompanying the original statute there is no emphasis on "passing," as a word of art or otherwise.[6] Probably the expression "passing"

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interesting to note that the Board used the following language (R. 26):

> The value of the property *passing to the widow and the daughter under the power* was $3,640,122. The value of the *remaining property passing under the power* was $4,788,837.60. The $3,640,122 *which went to the widow and daughter under the power* was less than they would have gotten had there been no exercise of the power. [Italics supplied.]

[6] The pertinent paragraph of the Committee Report (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22 (1939–1 Cum Bull. (Part 2) 86, 101) reads as follows:

> There has also been included in the gross estate the value of property passing under a general power of appointment. This amendment as well as that preceding is for the purpose of clarifying rather than

appears in the section only because of the uniform structure of the various subdivisions describing the property includible in the gross estate, and the necessity of connecting "property" with "general power of appointment exercised." "Passing under" had no particular significance but was simply the best connecting phrase that readily occurred.

In this connection it should be borne in mind that, the estate tax being a transfer tax and not an inheritance tax, Congress was imposing an excise upon the exercise by the decedent of his privilege. Thus, it was not concerned with what the appointees of the power received and had no reason to limit the tax to those cases where the appointees profited by the exercise of the power. The scheme of the statute is to levy a tax upon transfers and to base it upon the decedent's interest which ceased upon his death. While Section 302 (f) is confined to exercised powers, it does not

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extending the existing statute. A person having a general power of appointment is, with respect to disposition of the property at his death, in a position not unlike that of its owner. The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority. The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax.

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within these limits appear to depart from the statutory plan. Unless petitioners can establish the contrary, the term "passing" in this subsection should be construed as a substitute for the word "transfer" or "transferred." The latter expressions would have been inappropriate in this subsection and probably were not used simply because the decedent never was technically the owner of the property involved in the power. The New York statute (*infra*, p. 31) solved this drafting difficulty by providing that the exercise of a power "shall be deemed a transfer."

In any event, it seems almost certain that the draftsmen of the original Section 402 (e) would not have thought the statute inapplicable because the power happened to be exercised in favor of the donees in default of appointment. The theory, as evidenced by the Committee Report, was that the very possession of a general power of appointment is not unlike ownership, and that the exercise of such a power is an election to assert ownership rights which may be appropriately taxed. The exercised privilege of disposing of property was said to be equally deserving of taxation, whether it derived from actual ownership or possession of such a general power. See *supra*, fn. 6, pp. 20–21. Thus, the draftsmen emphasized the possession and exercise of the power and showed no concern with the identity of the appointees. Indeed, since powers are customary devices in family property

settlements, some or all of the appointees are likely to be the same family members who are described as donees-in-default (although they may not take identical estates or interests), and to have differentiated on account of identity would have largely destroyed the effectiveness of Section 402 (e). Nor, significantly, does the statute or the Committee Report have anything to say of the problems of comparison and evaluation which follow in the wake of the recognition of any such distinction (*infra*, pp. 42–50). An exercise, even though in favor of donees-in-default, was undoubtedly viewed as nonetheless a testamentary act which should be taxed—just as a will is nonetheless a testamentary act because it happens to favor heirs at law.

In short, neither the language of the statute nor its legislative history supports the narrow meaning of "passing" for which petitioners must contend. And no more than in *Detroit Bank* v. *United States*, 317 U. S. 329, 333, is there warrant to "impute to Congress an intention not disclosed by the statute or its legislative history."

3. There is nothing, likewise, in the general law of powers of appointment which persuades that Congress meant to imply an unexpressed distinction based on the identity of the appointees. The traditional view seems to have been that the donee of a power exercises no independent dominion over the property covered by it but serves merely

as the hand of the donor, so that the exercise is read back into the instrument creating the power and the property (in legal contemplation) passes under that instrument. 3 Restatement, Property (1940) 1811–1812; 3 Tiffany, *Real Property* (3d ed.), Sections 680 and 713; see *Wachovia Trust Co.* v. *Doughton*, 272 U. S. 567.[7] Thus, where the power is unexercised, the creditors of the donee are unable to reach the property covered by the power. *United States* v. *Field*, 255 U. S. 257, 264.[8] Nevertheless, these principles, taken at face value, throw no helpful light on the federal statute. To be sure, no tax is imposed under Section 302 (f) with respect to an unexercised power of appointment, and to some indeterminate extent this failure may be attributed to traditional notions of the nature of powers. But no resort to the general law of powers is necessary to determine the existence of this hiatus since Section 302 (f) plainly refers only to "exercised" powers.

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[7] The conclusion of this case concerning a state's power of taxation is no longer good law (*Graves* v. *Schmidlapp*, 315 U. S. 657) but it reflects the traditional conception of powers of appointment.

[8] Even here, however, the difficulties in a black-letter statement of the principles of the law of powers or in the construction by implication of a legislative policy on the basis of such principles are attested by the several states, including New York, which by statute permit creditors of the donee to reach property covered by an *unexercised* power of appointment. As to the New York statute, see *Cutting* v. *Cutting*, 86 N. Y. 522. The states having such statutes are listed in 3 Restatement, Property (1940) 1855–1857.

Cf. *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, with respect to Section 302 (a). And so far as exercised powers are concerned, the statute as plainly breaks with the traditional view and proceeds on the basis that "the privilege which he exercises" (*supra*, fn. 6, p. 21) properly subjects the donee's estate to the tax.

A majority of the states which have passed upon the point have held that where the power is exercised, the creditors of the donee may reach the property so far as necessary to satisfy their claims. *United States* v. *Field*, 255 U. S. at pp. 262–263. (The cases are collected in 59 A. L. R. 1520, 97 A. L. R. 1071, and 121 A. L. R. 804.)[9] If it is necessary to indulge assumptions, it is perhaps reasonable to suppose that the draftsmen of Section 402 (e) were influenced by the view that the exercise of a power gave the donee a sufficient interest in the property to make it available to his creditors. If so, it is of significance that under the common view the creditors took the property, in these circumstances, without regard to whether the appointment was or was not to takers in default. *Clapp* v. *Ingraham*, 126 Mass. 200, the leading American case holding for the creditors, itself involved an exercise of the power in favor of takers in default, although no point was made

[9] Of course, a strictly logical application of the traditional rule would defeat the creditors even in these circumstances.

of it.[10] It can be said categorically that there was no substantial body of cases which attached importance to the identity of the appointees. Thus, even if the 1918 statute is to be read on this background, there is no basis for importing into the law a differentiation in tax consequences turning on whether the exercise of the power favors takers in default or others.[11]

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[10] In *Hill* v. *Treasurer & Receiver General*, 229 Mass. 474, 476, the rule in favor of creditors is stated to rest "on the fundamental idea that a man ought to pay his debts *when he has the power to do so*, rather than to give property to those who are not his creditors." [Italics supplied.]

[11] The Restatement of the Law of Property (3 Restatement, Property (1940), Section 369) has adopted the view that if the appointment is of the same qualitative interest that the donee-in-default would otherwise have taken, and quantitatively does not exceed what he otherwise would have taken, the property passes not under the power but in default of appointment. The Comments and Illustrations state that the question is important with reference to the rights of creditors of the donee of the power (as to which also see Section 327, Comment b, and Section 329, Comment d), and to the liability of the donee and his heirs for estate and succession taxes.

The Restatement followed by many years the federal statute of 1918 and obviously provides a clue as to the intent of the framers of that statute only to the extent that it adopts rules of law firmly entrenched as of that time. In this connection it should be noted that Section 369 was the subject of a spirited dispute among the reporters and advisers who drafted the Restatement. It is instructive to compare the memorandum for the majority view, prepared by Reporter Leach, with the memorandum of the minority, prepared by Reporter Powell and Adviser Simes (and apparently con-

Moreover, the American case law of powers of appointment is "distinctly thin in quantity," there being virtually no decisions in many states in this field, and as late as the beginning of this century it could be said that there was no such thing as an American law of powers. 3 Restate-

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curred in by Adviser Madden). See Proposed Final Draft No. 2 of the Restatement of Property, 140, 151–155.

The majority brushes aside the many cases turning the rights of creditors solely upon an exercise of the power, with the comment that the issue of appointment to donees-in-default was not there raised. The majority relies upon one Kentucky case (*Boyce* v. *Waller*, 9 Dana 478), which the minority points out to be no longer significant law in Kentucky (since *St. Matthews Bank* v. *De Charette*, 259 Ky. 802, refused to follow the majority rule as to creditors), and one obscure dictum in a Texas Civil Appeals case (*Arnold* v. *Southern Pine Lumber Co.*, 58 Tex. Civ. App. 186, 197). Principally, the majority relies not upon cases which litigated the rights of contesting claimants to property but upon *tax* cases, such as *Re Lansing*, 182 N. Y. 238, and *Helvering* v. *Grinnell*, 294 U. S. 153 (discussed *infra*, pp. 30–32, 34–40).

As the minority observes, it is somewhat strange that a significant provision of the Restatement of the Law of Property should be framed in reliance upon cases interpreting state and federal tax statutes. It is even stranger that the Restatement should attempt to state a rule of federal tax law, such as is attempted by Illustrations 2 and 3 under Section 369. These illustrations are already out of date by virtue of Section 403 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which amended Section 811 (f) of the Internal Revenue Code (U. S. C., Title 26, Sec. 811 (f)), the successor to Section 302 (f).

ment, Property (1940) 1810.[12] This fact furnishes an additional caveat against attempting to read into the federal statute ill-defined concepts of the general law of powers of appointment, which upon more painstaking examination may prove spurious. Still further pause is given by the English cases, which take the view that the exercise of a power immediately divests the estates of those designated to take in default of appointment, and, even if the exercise is in favor of the takers in default, creates a *new* right in them. *In re Brooks' Settlement Trusts,* [1939] Ch. 993. See Farwell, *Powers* (2d ed., 1893) 275–278; 1 Paul, *Federal Estate and Gift Taxation* (1942) 449–451, where the cases are collected and discussed. And it has been assumed in England, as in this country, that a donee's creditors may reach the property even though the appointment is merely to takers in default. See *Vaughan* v. *Vanderstegen,* 2 Drew. 165, 177–178.

4. It is petitioners' theory that the will of the donor gave the takers in default of appointment vested interests in the property, subject merely to divestment on the donee's exercise of the power. Thus, where an exercise of the power is wholly or even partly in favor of the takers in default,

[12] The Restatement adds (pp. 1810–1811) that the—

> number of cases presented to the courts is now rapidly increasing, due largely to the very substantial estate and inheritance tax advantages which often can be obtained by the creation of trusts with powers of appointment.

it is argued that the interest which the default takers receive is merely what is left to them under the will of the donor and that there is no "passing" to them under the exercise of the power. Under this view each case must turn on the peculiarities of local law; it is maintained that under New York property law there is such a vesting under the donor's will.

We discuss *infra*, pp. 50–58, the New York cases relied upon by the petitioners. They fall short of the result which petitioners seek. Our basic challenge, however, goes to the contention that the local law of vesting and divesting is pertinent to the question of "passing." Such questions as whether a power of appointment is created under the will of the donor, the scope of the discretion given the donee, the validity of his exercise of the power and of any subsequent renunciation on the part of the appointees—these, we agree, are properly controlled by local law since they determine the substantial rights and interests of the parties. As applied to these questions it is local law which tells us what has actually happened as a necessary preliminary to the attaching of the tax consequences. But as applied to the question whether the appointed interest "relates back" to the will of the donor of the power and is thus regarded as having been "vested" in the appointee during the interim prior to the appointment, local law adds nothing.

For the answer to this does not touch the fact that it remained wholly within the power of the donee to decide whether the takers in default should ever receive anything of substance, and that by exercising the power the donee has manifested his decision. For present purposes, the relation back, vesting and divesting doctrines would seem to fall into the category of mere labels which a state is free to attach or not as it pleases, but which have no practical consequences and therefore should not be controlling for federal tax purposes. See *Morgan* v. *Commissioner*, 309 U. S. 78;[13] *Lyeth* v. *Hoey*, 305 U. S. 188; *Burnet* v. *Harmel*, 287 U. S. 103.

That the concept of "vesting" and "divesting" is of little practical consequence to the process of actual decision is demonstrated by *Re Lansing*, 182 N. Y. 238, a case which, as we shall see, was relied upon by this Court in *Helvering* v. *Grinnell*, 294 U. S. 153. The *Lansing* case arose under

[13] In the *Morgan* case, holding that what is a "general" power under Section 302 (f) is not controlled by state terminology, this Court stated the controlling principle (pp. 80–81):

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.

New York Laws (1897) c. 284, Section 220, Subdivision 5, which provided that where a power (general or special) is exercised, there—

> shall be deemed a transfer [of the subject property] taxable under the provisions of this act in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will;[14]

The donor of the power had died prior to the enactment of an inheritance tax law. The donee of the power died afterward but appointed all the property to the person who would have taken in default, and, in addition, the appointee renounced her rights under the will of the donee and elected to take under the will of the donor. The reasoning of the court followed two lines: (1) "The attempt to execute the power was not effective, because it did nothing" (P. 243). (2) The appointee "had the right of election and could refuse to take under the appointment and still hold the property * * *" (P. 244). On these bases it was held, by a divided court, that the tax could not constitutionally apply to the property covered by the power of appointment, since the rights of the appointee derived from the donor and were

[14] It will be observed that the New York statute did not use the word "passing."

unaffected by any action of the donee.[15] But in reaching this conclusion the court did not rely upon the language of vesting and divesting. The early portions of the majority opinion speak of the remainder as having "vested" in the taker in default immediately upon the death of the donor. 182 N. Y. at p. 243. The dissenting opinion, however, strenuously argued that what was taken was not a vested remainder but only a contingent remainder, since the taker could not be determined until the death of the donee. 182 N. Y. at pp. 250–254. Referring to this point of disagreement, the latter parts of the majority opinion abandon the terminology of vested and contingent remainders and insist merely that the rights of the beneficiary had "accrued" on the death of the donor of the power. 182 N. Y. at pp. 248–249.

The inquiry whether by local interpretation there is a "passing" of property under the exercise of a power or under the instrument creating the power is precisely the type of question which has been banned from the interpretation of federal tax statutes by the recent decisions of this Court. *Helvering* v. *Hallock*, 309 U. S. 106; see *Helver-*

[15] Other states differ. *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588; *State* v. *Brooks*, 181 Minn. 262, further hearing, 183 Minn. 251; *Mortague* v. *State*, 163 Wis. 58; *Manning* v. *Board of Tax Commissioners*, 46 R. I. 400. And see Eisenstein, *Powers of Appointment and Estate Taxes: I*, 52 Yale L. J. 296, 322 (1943), for a criticism of the constitutional doctrine of the *Lansing* case.

ing v. *Clifford,* 309 U. S. 331. It is no answer to suggest, as petitioners may, that the statutory use of the expression "passing" compels resort to local law. This assumes the point at issue and returns us to the considerations already discussed, *supra,* pp. 18–32), including the general law of powers at the time the federal statute was adopted. We have found no peculiar significance in the expression "passing" and, as we have seen, no well-grounded distinction turned upon the identity of the appointees where the power was in fact exercised.

5. Nor does anything in the administrative application of Section 402 (c) of the Revenue Act of 1918 or Section 302 (f) of the Revenue Act of 1926 warrant such a distinction. Treasury Regulations 37 (1919 ed.), promulgated within a few months after the enactment of the 1918 statute, contained an express statement (Article 30) that appointed property should be included in the donee's gross estate "although the persons to whom the appointment was made would have taken the property had the power not been exercised." The same provision was continued in Treasury Regulations 37 (1921 ed.), Article 30; Treasury Regulations 63 (1922 ed.), Article 25; and in Treasury Regulations 68 (1924 ed.), Article 24. For no apparent reason, the provision was omitted from Treasury Regulations 70 (1926 ed.), Article 24, and subsequent Regulations. As the cases

thereafter litigated show, the omission was not occasioned by any change in Treasury practice. See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 935, fn. 27 (1939).

6. This brings us to *Helvering* v. *Grinnell*, *supra*, and the subsequent decisions. Like *Re Lansing*, *supra*, the *Grinnell* case involved the exercise of a power of appointment in favor of the takers in default and an effective renunciation of the appointment by the appointees. In consequence, the appointees received under the will of the donor precisely the same interest they would have taken under the exercise of the power. The Court, speaking through Mr. Justice Sutherland, observed that two of the requirements of Section 302 (f) had been met. The decedent possessed a *general* power of appointment and *exercised* it. But it was held that the third requirement was not satisfied because the property did not *pass* under the exercised power.

It will be seen that the precise holding of the *Grinnell* case does not touch the instant controversy, for here there was no renunciation and the interests appointed under the exercise of the power were substantially different from what would have been taken in default of appointment. Discussion of the *Grinnell* case centers upon the apparent rationale of that decision. There is much in the opinion to indicate that the Court

considered the renunciation of the appointment to be of decisive force and that in its absence there would have been a statutory "passing" of the property to the appointees. This was the view of the *Grinnell* case taken in the court below by Judge Frank (R. 114–118).

The core of the *Grinnell* opinion seems to be imbedded in the following language (294 U. S. at p. 155):

> If they [the beneficiaries] had wholly refused to take the property, it could not well be said that the property had passed under the power, for in that event it would not have passed at all. Can it properly be said that because the beneficiaries elected to take the property under a distinct and separate title, the property nevertheless passed under the power? Plainly enough, we think, the answer must be in the negative.

The opinion then goes on to consider in some detail and to approve the reasoning[16] of *Re Lansing, supra*. The discussion of the *Lansing* case concludes with the following quotation from the opinion of the New York Court of Appeals (182 N. Y. at p. 245; 294 U. S. at pp. 157–158):

> An appointee under a power has the right of election, the same as a grantee under a

[16] It seems very clear that the Court regarded the *Lansing* decision as *persuasive* rather than *controlling*—an important distinction so far as the operative force of state law is concerned.

> deed. * * * He can accept the title tendered or reject it in his discretion. It cannot be forced upon him against his will. He cannot be compelled to receive additional evidence of title when he does not want it, and does not need it because his title is perfect without it. His consent is necessary before the attempt to exercise the power becomes binding upon him the same as consent is necessary in making a contract or agreement. Declining or refusing to take has the same effect as incapacity to take, as in the case of a devise to a corporation which has no power to hold any more property because the statutory limit has been exceeded. The title is not affected, but remains where it was before.

The reasoning of the *Lansing* case, however, as we have seen, moved in two directions, and attributed weight both to the fact of renunciation and to the fact that the interest appointed was the exact equivalent of the interest which would have been taken in default of appointment. It must be recognized that the *Grinnell* opinion, in referring to the *Lansing* case, stated both of these grounds of decision. The opinion also contained an earlier quotation from the *Lansing* case (294 U. S. at p. 157), which seems to be directed solely to the point of equivalence.

Moreover, at the end of the *Grinnell* opinion (p. 158) Mr. Justice Sutherland referred to a conflict in "reasoning and conclusions" between

the Circuit Court of Appeals for the Second Circuit in the *Grinnell* case (70 F. 2d 705) and the courts in two cases in which there had been no renunciations (*Wear* v. *Commissioner*, 65 F. 2d 665 (C. C. A. 3d); *Lee* v. *Commissioner*, 57 F. 2d 399 (App. D. C.)). The opinion of the Court continued that "to the extent of the conflict" the "view" of the *Wear* and *Lee* cases was considered to be wrong and that of the court below in the *Grinnell* case to be right. Since the absence of renunciation could have been used to distinguish the *Wear* and *Lee* cases, the failure of the Court to dispose of these cases on this ground gives some support to the view that the renunciation factor was not decisive. But it is not clear that this is the meaning. The *Wear* opinion, reasoning from the legislative history and purpose of the estate tax, had concluded that Section 302 (f) was applicable because the "generating source" of the perfected right of the donees-in-default "was the death of the donee [of the power] without action adverse to them" (65 F. 2d at p. 667). Much the same thought was expressed in the *Lee* case (57 F. 2d at p. 402). The Circuit Court of Appeals for the Second Circuit in the *Grinnell* case had disapproved that argument as proving too much in that it was equally applicable to confirmation of the title of the donees-in-default through *non-exercise* of the power (70 F. 2d 705, 707–708).

In this sense, the reasoning and conclusions of the *Wear* and *Lee* cases were wrong, even though the precise decisions may have been correct. It is not clear that Mr. Justice Sutherland intended to go any further than this.

Though it must be acknowledged that the *Grinnell* opinion mentioned both the factor of renunciation and the factor of lack of any change of interest through the appointment, the recent opinion of the Court in *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, strongly indicates that the first factor is now considered to be the only significant one. In the *Safe Deposit* case the Court decided that a compromise based in part upon an attempted appointment of very doubtful validity was sufficient to invoke Section 302 (f); the case was remanded with instructions to augment the donee's gross estate by that part of the compromise share going to the appointees which could properly "be imputed to the claim based on the attempted exercise of the power of appointment" (316 U. S. at p. 66). In making its decision the Court used this very significant language (p. 65).

> It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise *preceding* the receipt of income in connection with an income tax; but that a compromise occurring *after* the decedent's death, which is the "taxable event" under

> an estate tax, should not be considered. Whatever may be the general rule in this respect, this Court has clearly recognized, in *Helvering* v. *Grinnell,* 294 U. S. 153, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Section 302 (f). In that case, the decedent had exercised a general testamentary power of appointment, an act which under Section 302 (f) brings the property subject to the power within the gross estate. The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to place the property subject to the power outside the scope of Section 302 (f).

This language emphasizes the *exercise* of the power as invoking Section 302 (f), and the renunciation of the appointment as forestalling the application of the section. The plain inference is that, in the absence of renunciation, the tax would have applied in the *Grinnell* situation. Otherwise the reference to the *Grinnell* case in this context is meaningless. The minority opinion in the *Safe Deposit* case seems to agree with this interpretation, observing (316 U. S. at p. 68):

> In *Helvering* v. *Grinnell, supra,* the decedent exercised the power, but the ap-

> pointees, as was their right under state law, elected not to take under the appointment but to take as remaindermen directly from the estate of the creator of the power, and it was held that Section 302 could not be invoked to impose a tax upon the estate of decedent. * * *

The minority opinion then quotes from the *Grinnell* case the language as to the force of an election which we have already quoted, *supra*, p. 35.

Furthermore, the decision in the *Safe Deposit* case conflicts with the notion that there must be a "passing" of the property under the power *according to local law*. The Board of Tax Appeals had held that although the power was purportedly exercised by the donee's will, Section 302 (f) was inapplicable because the donee was too young to make a valid will under the law of his domicile, and hence had not succeeded in passing the property under the law. *Reynolds* v. *Commissioner*, 42 B. T. A. 145. In the Circuit Court of Appeals for the Fourth Circuit and in this Court the Government did not dispute the Board's interpretation of the local law. But this Court took the view that Section 302 (f) applied to the compromise despite the absence of a technical local law "passing" under an exercised power. The question, in the words of Section 302 (f), whether there was a statutory "passing under a general

power of appointment exercised," was regarded as wholly a *federal* question.[17]

7. If we are right in our position, the failure of the instant appointees to renounce is decisive and the tax is applicable without regard to a comparison of the interests taken under the exercise of the power and the interests which would have been taken in default of appointment. It may be thought that this makes for a somewhat incongruous result where the beneficiaries and the interests which they receive under the exercise of the power are precisely the same as in default of appointment. If this be an incongruity it is inherent in the faulty concept of the statute, which fails to tax the nonexercise of powers. See Griswold, *Powers of Appointment and the Federal Estate Tax,* 52 Harv. L. Rev. 929, 935 (1939).

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[17] In *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758 (C. C. A. 3d), and *Legg's Estate* v. *Commissioner*, 114 F. 2d 760 (C. C. A. 4th), decided prior to the *Safe Deposit* case, the courts interpreted the *Grinnell* decision to mean that failure to renounce was indecisive and undertook to decide whether there was a "passing" of the property under the exercise of the power according to the local law (that of Pennsylvania). The same interpretation of the *Grinnell* case was recently reaffirmed by the Circuit Court of Appeals for the Third Circuit in *Lewis* v. *Rothensies*, decided September 1, 1943. In each case decision went for the taxpayer. For the reasons already discussed, these cases were wrongly decided. They also seem erroneous for another reason (discussed under Point I B, *infra*, pp. 42–50) in that in none was there an equivalence between the interests appointed under the power and the interests which would have been taken in default of appointment.

And this defect has now been corrected by Section 403 of the Revenue Act of 1942, c. 619, 56 Stat. 798, under which possession rather than the exercise of powers of appointment is the significant consideration.[18]

B. WHERE, AS HERE, THE EXERCISE OF THE POWER IS EFFECTIVE TO DISTURB THE FLOW OF BENEFITS, THERE IS A PASSING OF ALL THE PROPERTY UNDER THE POWER

If we are wrong in our position that the failure of the appointees to renounce the appointment requires, without more, the application of Section 302 (f), it then becomes necessary to compare the identity of the appointees and their interests with the identity of the takers in default under the will of the donor and the interests which they would have taken. For example, it is not disputed in this case that the one-third interest taken outright by Peter, who was not a taker in default, must be included within decedent's gross estate. Similarly, it is not disputed that the interests appointed to follow the trust estates of the widow and the daughter must be included within the gross estate. As under Point I A, *supra*, it is our position that, in addition, the interests taken out-

[18] In this connection, it should be noted that taxpayer's comments on Section 403 of the Revenue Act of 1942 (Br. [illegible]) are based upon a theory of a partial release of a general power, leaving only a restricted power to be exercised by will. Whether such a partial release would be valid is arguable, and whether decedent, in any event, would have chosen during his life so to restrict his exercise of the power at death is wholly speculative.

right and the trust estates appointed to the widow and the daughter must be included. We submit that any exercise of a power which is effective to disturb the flow of benefits, either with respect to the identity of the beneficiaries or of the interests taken, works a "passing" of all the property under the power.

It should be noted, at the outset, that in this aspect the *Grinnell* case can give petitioners no support whatever. The *Grinnell* opinion, relying upon the *Lansing* case, classifies as ineffective only an exercise "which leaves everything as it was before" (294 U. S. at p. 157). The exercise in the *Grinnell* case, like that in the *Lansing* case, made absolutely no change in the flow of economic benefits. It bestowed the same quantitative and qualitative interests upon the same appointees who would have taken in default of appointment, a consideration that may be regarded as critical in the light of *Re Cooksey*, 182 N. Y. 92, argued on the same day as the *Lansing* case, and *Re Dows*, 167 N. Y. 227 (affirmed *sub nom. Orr* v. *Gilman*, 183 U. S. 278), both of which were distinguished in the *Lansing* opinion (182 N. Y. at pp. 246–247). In these cases the appointments were to the donees in default, but with slight variations in the time and manner of payment. They were held to be effective appointments, incurring the New York tax. Thus, the careful description in the *Lansing* opinion of effective appointments as those which leave everything absolutely unchanged was sig-

nificant, and it is fair to assume that the significance was not lost on this Court. Assuming, then, that the failure to renounce is not alone decisive, the strong implication of the *Grinnell* case is that an exercise of a power which fails to leave everything as it was before and which accordingly does disturb the flow of benefits is effective to render the tax applicable.

The facts of the instant case show that here to a very substantial degree there was a modification or rearrangement of the flow of benefits. Not only was Henry Rogers III, who under the will of the donor would have taken a one-third share outright, eliminated entirely, in favor of the grandson, Peter, who would not have taken in default of appointment, but the interests of the widow and daughter were also radically changed. Under the will of the donor, they would have each received one-third of the property outright. In fact, they each received outright only a minor share. The balance of the property was conveyed not to them individually, as contemplated by the donor's will, but to trustees who were complete strangers to the donor's will. It was the latter who received legal title and assumed the rights and obligations of legal ownership. Apart from the contingent interest given the daughter in the widow's share, the widow and daughter, respectively, were given only choses-in-action against the trustees to compel them to pay over the income to them, and this only during specified

periods. The decedent exercised his power over the property to terminate one-half of his widow's interest in the trust upon her remarriage (which occurred within two years after his death) and to direct the disposition of all of the remaining trust property upon the death of the widow and the daughter, respectively.

Indeed, the present case presents so thoroughgoing a rearrangement of the interests that the decision below can be supported without the necessity of approving the rule that *any* change in the flow of benefits is sufficient to incur the tax. In the court below, Judge L. Hand found it unnecessary to approve "the absolute doctrine that in the absence of renunciation all interests appointed must inevitably pass under the power" (R. 122). He also found it unnecessary to hold that *any* modification of the flow of benefits was sufficient to require a passing of the property under the power, and assumed "for argument" (R. 120) that there might be a passing of some interests under the power but not of others. He did accept, however, our further alternative position that where every part of the subject property is affected by the appointment—that is, where there is no part which can be pointed to as an untouched remnant of the default interest which would have passed absent appointment—then the exercise of the power has been completely effective. In Judge Hand's words, "no interests should be excluded from the donee's estate to whose creation

the exercise of the power was necessary" (R. 120). Even under this restricted test, which we likewise urge as an alternative contention here, it will be seen that every part of the property did pass under the appointment.

From a quantitative standpoint, overlooking the qualitative differences in the interests appointed to the widow and the daughter, the decisive fact is that the decedent appointed one-third of the property to Peter, who was not named in the donor's will. Once this had been decided upon, it was impossible for the decedent to permit the remainder of the property to pass in default without frustrating his purpose with respect to the widow and the daughter. Had the balance passed in default, the widow and daughter would have shared equally with Henry Rogers III in the remaining two-thirds and would have received only two-ninths of the property, respectively. As Judge Hand observed (R. 121), in order to give to each the widow and the daughter even legal interests in one-third of the property, it was absolutely essential for the decedent to exercise his power with respect to them.

Also important is the change in the quality of the interests which was effected by the exercise of the power.[19] Plainly, there was no way in which

[19] Judge Hand observed (R. 121) that the distinction between legal and equitable interests is important under New York law. In this connection, it should be noted that he referred to the state law only for light on the nature of the interests created, and not on the question of "passing."

decedent could have secured the conveyance of the property to trustees for the benefit of the widow and the daughter, rather than a conveyance to them outright, without exercising the power with respect to their shares. Similarly, there was no way in which he could have terminated the widow's interest in a part of the corpus upon her remarriage and the balance of her interest upon her death, or the daughter's interest upon her death, or have appointed contingent interests following the termination of the trust estates, without exercising the power.

It is petitioners' contention that where a power is exercised in such manner as to appoint to the same beneficiary an interest of less value than he would have taken in default of appointment, the exercise of the power *pro tanto* is ineffective and no property passes under it. It will be seen, however, that this view is wholly artificial and depends upon a series of assumptions constructed to secure the desired result. In the present case the monetary value of the property taken outright and of the trust interests of the widow and the daughter was less than the one-third interests which they would have taken in default of appointment. But it is indulging in fiction to say that these interests resulted, not from an exercise of the power with respect to the widow and daughter, but merely from appointing away to others various interests in the property. As we have seen, the appointment to Peter would not have se-

cured the results which accrued, even overlooking the qualitative differences in the interests in fact taken by the widow and the daughter; it was necessary for the decedent to go further and to make an express disposition of the balance of the property. So likewise with respect to the qualitative differences. By no conceivable method of carving away remnants of the property could decedent have caused the untouched balance to wind up in the hands of the Central Hanover Bank and Trust Company and two individuals as trustees for the widow and daughter. It does not seem logically possible to say, for that matter, that a life estate even absent a trust is merely an undisposed of portion of a fee interest. And it becomes even more fanciful to suggest that a contingent interest could in any circumstances represent an undisposed of remnant of a fee.[20]

It is true that *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758 (C. C. A. 3d), and *Legg's Estate* v. *Commissioner*, 114 F. 2d 760 (C. C. A. 4th), held that an equitable life estate is a remnant which can be obtained by starting with an absolute interest and carving away portions of it. This result was obtained upon a pur-

[20] Even the Restatement, which takes the position that nothing passes under the exercise of a power when the appointed interest is quantitatively of equal or less value than that which would have been taken by the same person in default of appointment, is silent where the interests are qualitatively different. 3 Restatement, Property (1940), Section 369, Second Caveat.

ported application of Pennsylvania property law, which is at best doubtful upon the basis of the two Pennsylvania cases relied upon.[21] However, the law of New York is to the contrary where qualitative differences are concerned (*infra*, pp. 51–53) and even if the Pennsylvania cases supported these decisions, it seems clear that the application of a federal taxing statute should not be shaped to such local peculiarities.

We submit, therefore, that even if the failure of the beneficiaries to renounce was not decisive, petitioners must still fail. Without regard to the state law of vesting and divesting, there is a "passing" of the property under Section 302 (f) where the exercise of the power is effective to disturb the flow of benefits. At the very minimum, there is a passing of the property under the exercise of the power where there is no untouched remnant which goes to a taker in default. In the language

[21] The Third and Fourth Circuit cases relied upon *Freeman's Estate* (*No. 1*), 35 Pa. Super. Ct. 185, and *Potter's Estate*, 13 Pa. Dist. & Co. R. 667. *Freeman's Estate* involved a gift of trust income to A's children for the specified duration of the trust, unless A otherwise appointed. A appointed the income to his wife for life, with no other appointment. It was held that his children had a vested interest which was only partially defeated by the appointment, i. e., the children took the income after the wife's death.

Potter's Estate was decided for the purpose of saving federal taxes, and apparently for no other purpose. No substantive rights appear to have been affected. The gift in default was identical with the appointed gift in both quantity and quality, and the court for that reason concluded that the property passed under the donor's will.

of Judge Hand, "no interests should be excluded from the donee's estate to whose creation the exercise of the power was necessary" (*supra*, p. 45). Under any of these tests the exercise was completely effective in the instant case and there was a passing of all of the property under it.

II

Even Applying New York Law, All of the Property Must be Included Within Decedent's Gross Estate Except One Small Share Appointed Outright to the Widow

The discussion under Point I, A, and B, is independent of the peculiarities of local law regarding the passing of property and contends for a wholly federal test with respect to the application of Section 302 (f). If either of the alternative views advanced under A or B is accepted by the Court, further discussion will be unnecessary. If the Court should disagree, however, with the substance of what has been said under Point I, we then desire to press certain further considerations in support of the decision below. It is our position that even the New York cases purporting to decide when a power of appointment has been effectively exercised, and thus by analogy when there has been a passing of property under it, require affirmance of the judgment below as to all except the amount of tax attributable to the rela-

tively small share appointed outright to the widow, of a value of $187,319.36."

A. Whatever the New York law as to the effect of powers of appointment where the *quantitative* interest is equal to or less than the interest which would have passed to the same beneficiary in default of appointment, it seems reasonably well established in the state tax cases that where the *qualitative* interest appointed to a taker in default is different from what would have been taken in default of appointment, there is a passing under the exercise of the power. *Re Cooksey*, 182 N. Y. 92; *Re Dows*, 167 N. Y. 227, affirmed *sub nom. Orr* v. *Gilman*, 183 U. S. 278; *Re Rogers*, 71 App. Div. 461, affirmed, 172 N. Y. 617; *Re Warren*, 62 Misc. 444; *Re Lowndes*, 60 Misc. 506. Cf. *Re Rynear*, 130 Misc. 804; *Re Chapman*, 133 App. Div. 337. Also, see *Re King*, 217 N. Y. 358, *Re Canda*, 197 App. Div. 597 (see p. 600), applying the *Lansing* principle, involved an appointment of equitable life estates to the donees-in-default but the nature of the interests which they would otherwise have taken is not revealed; and,

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[11] In attempting to prove that the New York decisions support their position, the petitioners are forced to rely upon state tax decisions, rather than upon decisions adjudicating the property interests of private litigants. It seems evident that state tax cases are a poor vehicle for the determination of property law, since they involve public interests which rightly tend to obscure the precise distinctions which may be appropriate in adjudicating claims between individuals. Cf. *Re Lansing*, *supra*.

in any event, the appointees elected to reject the appointments and to take in default.[23]

Re Lichtenstein, 177 Misc. 320, is contrary to the great weight of authority and holds that an appointed interest of different quality may nevertheless pass under the will of the donor. The court said (p. 326) that the answer was "not clear under the cases in this State" but had been settled by the federal cases, referring to *Legg's Estate* v. *Commissioner, supra,* and *Rothensies* v. *Fidelity-Philadelphia Trust Co., supra.* We submit that no weight should be attached to a decision of an inferior court which is against the mass of authority in its own jurisdiction, and which relies upon federal cases in turn dependent upon the law of another jurisdiction. To argue that cases of very considerable consequence to the federal revenue should turn on a lower state

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[23] At the time this case was decided the factor of renunciation was considered significant, under *Re Slosson*, 216 N. Y. 79. *Re Duryea*, 277 N. Y. 310, which indicates that election is no longer important, had not yet been decided.

Possibly some of the above-cited cases, such as *Re Cooksey, supra,* could have been made to turn on the point that the interests appointed were quantitatively greater than what would have been taken in default of appointment. (See cases cited *infra*, pp. 53–54.) The fact is that none of the cited cases appears to have been decided on that basis.

Re Dows, supra, and *Re Lowndes, supra,* were proceedings to fix the tax with respect to the estate of the donor of the power rather than of the donee. But the question was the same as though the tax were sought to be collected from the donee's estate, namely, whether the power had been effectively exercised.

court decision of this character underscores the impracticality of the state-law approach to the problem.

Apart from the small shares appointed outright to the widow and the daughter, the quality of the interests which they took under the power of appointment was obviously different from the interests which they would have taken under the will of decedent's father. Under the will of the latter, they would, of course, have taken the entire balance of the one-third shares in fee. Under the exercise of the power, they received equitable interests in the balance of the one-third shares for specified periods, and the daughter, in addition, received merely a contingent interest in the widow's share. Under the foregoing line of New York cases, therefore, the exercise of the power was effective as to all of the property in controversy except the two shares appointed outright to the widow and the daughter, of a value in each case of $187,319.36.

B. It is also apparently settled by the New York tax cases that where under the exercise of the power the appointee receives an interest of greater value than he would have received in default of appointment, the exercise of the power is wholly effective. *Re Delano,* 176 N. Y. 486, affirmed *sub nom. Chanler* v. *Kelsey,* 205 U. S. 466; *Re King, supra; Re Taylor,* 209 App. Div. 299, affirmed, 239 N. Y. 582; *Re Vanderbilt,* 281 N. Y. 297, affirmed *sub nom. Whitney* v. *Tax Com-*

mission, 309 U. S. 530; *Re Chauncey*, 102 Misc. 378. Cf. *Re Vanderbilt*, 50 App. Div. 246, affirmed, 163 N. Y. 597.

This line of cases raises the question of the proper valuation of the daughter's interests. Petitioners have contended only that the value of the property appointed outright to the widow and the daughter and the value of their interests in the trust estates should be excluded from decedent's gross estate (R. 50).[24] In taking this position they were perhaps apprehensive of the application of the New York cases last cited. The Board of Tax Appeals, in accord with petitioners' contentions, computed the value of the interests passing to the widow and the daughter in a manner to include only the value of the property passing outright and of their interests in the trust estates. (And in valuing the interest of the widow in the trust estate, the Board made no deduction on account of the contingency of her remarriage. See

[24] It will be noted that the stipulation (R. 50), in stating petitioners' contention, refers to the interests of the widow and daughter in the trust estates as "life interests." The interest of the widow, of course, was not a life interest in the entire corpus of her share of the trust, since the trust in one-half of the corpus was to terminate upon her remarriage. To avoid confusion, we have throughout the brief referred to the widow's and daughter's alleged "life interests" in the trusts simply as their interests in the trusts, without regard to the provision as to the widow's remarriage. Either terminology refers only to the interests of the widow and daughter as income beneficiaries of the trusts and does not include the daughter's contingent interest in the corpus of the widow's trust (*supra*, fn. 1, p. 3).

pp. 58–60, *infra.*) On this basis, the Board reached a value for the excluded property of $3,640,122, apparently computing the total value of the daughter's interests at $1,954,324.32 (*supra*, fn. 4, p. 16). It seems clear that this valuation is too low, since it fails to take into account the value of the daughter's contingent interest in the corpus of the widow's trust. While petitioners have made no contention regarding this interest, it should be included if the New York cases are to apply since under them it is important to determine whether the interests appointed exceed in value the interests which would have been taken in default of appointment.

Under the decedent's will the trustees, upon the remarriage of decedent's widow, were to pay over one-half of her share of the trust corpus (R. 64)—

> to the issue of my marriage with my wife Pauline surviving such remarriage, in equal shares, per stirpes and not per capita, absolutely and forever. In the event that no issue of my marriage with my wife Pauline shall survive the date of her remarriage, I give, devise and bequeath said one-half of the principal of the trust estate to my other issue surviving the date of her remarriage, except Henry, per stirpes and not per capita, or if no such other issue of mine, except Henry, survive the date of such remarriage, then to my heirs at law and next of kin, except Henry, entitled to inherit the same under the laws of the State of New

York in force upon the date of such remarriage.

In the event of such remarriage, the remaining portion of the widow's trust share was upon her death to be paid over absolutely to the remaindermen just named, determined as of the date of the widow's death. Likewise, in the event the widow never remarried, all of her share of the trust property was to be paid over absolutely upon her death to these remaindermen, determined as of the date of her death. (R. 63–64.) As we have seen, there were no children of decedent's marriage with the widow, and there were only two others of decedent's children, Millicent and Henry, surviving his death. Henry and his issue were excluded, however, from participation in the distribution of the corpus of the widow's trust, leaving Millicent alone or her issue as participants.[25] It is on this

[25] We do not believe that the children of Henry, if there were any, could take under a gift over to decedent's "issue * * *, except Henry, per stirpes and not per capita," and we mention the point only because petitioners contended otherwise in the court below. "Per stirpes" means representation according to stock. The issue of any child deceased at the determinative date would, under a limitation to issue per stirpes, take only the share which their deceased ancestor would have taken if he had lived until that date. 3 Page on *Wills* (Lifetime Ed.), Sec. 1070. See *Re Wienholz*, 94 Misc. 55; *Re Foster*, 144 Misc. 622, 625. For specific applications of this rule excluding the issue of an ancestor who had been disinherited, see *Sullivan* v. *Straus*, 161 Pa. 145; *Power* v. *Power*, 296 Ill. 611; *Maddock* v. *Haines*, 88 F. 2d 350 (C. C. A. 7th). Under

basis that the value of Millicent's interest at the date of decedent's death in the corpus of the widow's trust must be determined.

The present worth of $1 due at the death of a person aged 45 (the widow) provided a person now aged 33 (the daughter) is then living is $.32983.[26] Applying the factor of $.32983 to the value of the property put in trust for the widow ($2,622,330.50)[27] the product is $864,923.27. When this amount is added to the value of the interests of the daughter in her share of the property taken outright and in the trust estate created for her benefit ($1,954,324.32), it will be seen that the total value of the interests taken by the daughter amounts to $2,819,247.59. This exceeds the value ($2,809,649.86) of the one-third share which the

---

the above authority, the Fifteenth Article of decedent's will (R. 69–70) would appear to have no bearing on the matter. See *Re Weissmann*, 137 Misc. 113, affirmed, 232 App. Div. 698.

[26] This factor is based on the Actuaries' or Combined Experience Table of Mortality, with compound interest at the rate of four percent a year, as is required by Treasury Regulations 80 (1937 ed.), Article 10 (i) (3), and the results set forth above are taken from computations made by the Bureau of Internal Revenue. Of course, if the court agrees with the Government's position here, it would be appropriate to remand the case so that the figures and computations may be checked under proper safeguards.

[27] This figure is obtained by deducting from the value of one-third of the entire property ($2,809,649.86) the value of the interest taken by the widow outright ($187,319.36).

daughter would have taken outright in default of appointment. Moreover, this computation does not take into account the fact that the daughter's interest in one-half of the corpus of the widow's trust was to pass immediately to the daughter in event of the widow's remarriage. We refer to this factor, *infra*, pp. 58–60. If this contingency is taken into account, the value of the interests appointed to the daughter is increased and would exceed by a wider margin the value of the one-third share which she would have received outright in default of appointment.

Applying the line of New York cases applicable where the interest appointed exceeds the value of the interest which would have been taken by the same beneficiary in default of appointment, it thus appears that the exercise of the power was effective as to the entire interests taken by the daughter, including even the share appointed outright, and that all should be included as a part of decedent's gross estate.

Consequently, the net effect of an application of New York law is to exclude from decedent's gross estate only the small share appointed to the widow outright.

The ultimate view of the case which the Court adopts might conceivably make important an exact computation of the value of the interest received

by the widow under the appointment.[28] As we have seen (*supra*, pp. 54–55), the Board of Tax Appeals computed the value of the widow's share under the exercise of the power as if she had a life interest in the trust established for her benefit, without regard to the contingency of her remarriage. (Similarly, the Board placed no value upon the daughter's contingent interest in the corpus of the widow's trust, and hence for this purpose did not take into account the factor of the widow's possible remarriage.) The fact is, however, that in the event of the widow's remarriage one-half of the corpus of the trust established for her benefit was to be paid over to the daughter. If a precise valuation of the widow's interest becomes important, questions arise (1) whether the probabilities of the widow's remarriage may be evaluated (compare *Humes* v. *United States*, 276 U. S. 487, and *Robinette* v. *Helvering*, 318 U. S. 184, with *Brotherhood* v. *Pinkston*, 293 U. S. 96, and *Commissioner* v. *State Street Trust Co.*, 124 F. (2d) 948 (C. C. A. 1st); and (2) whether, if they may not be evaluated, the consequence is (a)

[28] Such a situation would arise, for example, if the Court should reject our argument under Point I *in toto* and accept our argument under Point II only to the extent of agreeing that all of the daughter's interest passed under the power because it was of a greater value than the interest which she would have taken in default of appointment. The result would be that the widow's interest, which obviously was of less value than the one-third she would have received outright in default, would be excluded from the gross estate.

that the contingency should be ignored and the widow's interest in the entire trust treated as a full life interest, or (b) that the value of her interest in the one-half of the trust subject to the contingency should be wholly eliminated (cf. *Helvering* v. *Fitch*, 309 U. S. 149; *Helvering* v. *Leonard*, 310 U. S. 80; *Pearce* v. *Commissioner*, 315 U. S. 543, and *Robinette* v. *Helvering*, *supra*). Neither question was considered by either the Board of Tax Appeals or the Circuit Court of Appeals in their opinions disposing of this case, and in view of the collateral character of these questions, it would be appropriate to remand the case for further proceedings if the precise value of the widow's interest be deemed material.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1943.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(f) [as amended by Section 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

* * * * *

Treasury Regulations 80 (1937 ed.):

ART. 24. *Property passing under general power of appointment.*—Property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor), if the power is exercised by will. It should be so included if the power is exercised by deed or other instrument in contemplation of death. It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers made in contemplation of death and transfers included in the phrase, "intended to take effect in possession or enjoyment at or after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 16, 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of

each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 66.

Estate of HENRY H. ROGERS, Deceased, ADRIAN H. LARKIN, ALBERT STICKNEY and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors, Petitioners,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

MOTION OF THOMAS D. ALLISON, ADMINISTRATOR D. B. N. C. T. A. OF THE ESTATE OF MARGARET M. ALLISON, DECEASED, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

WILLIAM G. HEINER,
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v.

GUY T. HELVERING, Commissioner of Internal Revenue.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for Thomas D. Allison, Administrator D. B. N. C. T. A. of the Estate of Margaret M. Allison, Deceased, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*, consent of all parties having been obtained and filed with the Clerk.

WILLIAM G. HEINER,
1321 Park Building,
Pittsburgh, Pa.,
Attorney for Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

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v.

GUY T. HELVERING, Commissioner of Internal Revenue.

BRIEF OF THOMAS D. ALLISON, ADMINISTRATOR D. B. N. C. T. A. OF THE ESTATE OF MARGARET M. ALLISON, DECEASED, AS AMICUS CURIAE.

Preliminary Statement.

The person in whose behalf as *amicus curiae* the instant brief is filed now has in litigation pending before the United States Circuit Court of Appeals for the Third Circuit a case in which the same issues have been raised as have been raised in this case pending before this Honorable Court. Counsel for the parties in that case pending before the said Circuit Court of Appeals have stipulated, in effect, that the decision of the said Circuit

Court of Appeals may await the outcome of the decision of your Honorable Court in this case and the Court has approved that stipulation. The amount of the estate taxes heretofore paid in that case will be refundable if the decision of your Honorable Court in this case is in favor of petitioners in this case, and therefore it is apparent that *amicus curiae* has a direct interest in the decision to be rendered in this appeal.

Argument.

POINT I.

Title Under Local Law Must Be Determined in Limine.

When a testator or settlor creates a remainder over in default of testamentary appointment by a donee of a general power of appointment, there would seem to be no escape from the necessity to determine under local law what title, if any, vests in such remaindermen at the time of the creation of such gift over. If under local law such remaindermen have a vested interest in the appointed property at the time of the creation of the gift, it is respectfully submitted that a federal tax statute could not divest such vested interest Taxes are imposed on ownership, uses, enjoyments, privileges, etc., but taxes are not designed either to create or divest title to property. If title to property under local law may be disregarded for federal tax purposes, property of or the use of property by one may be taxed to another.

POINT II.

Renunciation of an Appointment and Election to Take as Remaindermen, If Necessary, May Be Filed by Remaindermen at Any Time Before Distribution.

Where upon the death of a donee of a general power of appointment the appointees remain absolutely silent and do nothing, they might reasonably be considered as acquiescing in the interests which vested in them at the time of the creation of the power. There would seem to be no greater reason why they should be regarded as electing to take under the will of the donee. Why should appointees be given the control over taxation? What considerations necessitate that rule?

If renunciation and election are necessary, when in point of time must the appointees file their renunciation and election to take as remaindermen in order to free the donee's estate from taxation? Must they file their renunciation and election immediately upon knowledge of the bequests of the donee and upon the probate of the will, or prior to the institution of estate tax litigation, or may they not wait until immediately prior to distribution and then file such a document? Is there any reason why appointees may not file their renunciation and election after the termination of even unsuccessful tax litigation but prior to distribution of the donee's estate?

It is respectfully submitted that renunciation and election are either unnecessary to free the donee's estate from taxation or, if necessary, the renunciation and election may be filed at any time prior to the distribution of the donee's estate.

POINT III.

Property Does Not Pass From a Donee of a Testamentary Power of Appointment to the Donee's Appointees Where They Would Have Taken the Same or More of the Same Readily Divisible Property on the Death of the Donee Had the Donee Not Exercised the Power.

This Honorable Court, in deciding the case before it, should, we respectfully submit, consider the various kinds of property which may be the subject of bounty. If, for example, the appointed property consists of a house and lot and the appointee would have taken an undivided one-fourth interest in the house and lot had the power not been exercised but all of the house and lot under the exercise of the power, it is clear that the appointee must rely upon the donee in order to get title to the whole of the house and lot. But where property is readily divisible, such as shares of stock, a donee may appoint 14 shares of stock to an appointee who if the donee had died intestate and not exercised the power would have, as remainderman, received 18 shares. In such case there would be no need for reliance on the part of the appointee upon the will of the donee, for if 18 particular shares were vested in the appointee at the time of the creation of the power, clearly 14 of those same shares remained vested in the appointee at the time of the alleged exercise of the power, and the remaining 4 shares could readily be separated and pass under the donee's will.

It is respectfully submitted that in so far as an appointee may take less property than otherwise would be

taken if the power had not been exercised, the donee's estate is free from taxation if the nature of the appointed property is such that it is readily divisible.

Respectfully submitted,

WILLIAM G. HEINER,
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Attorney for Thomas D. Allison, as Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES.

No. 66.—October Term, 1943.

Estate of Henry H. Rogers, Deceased, H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company, Executors, Petitioners,
vs.
Guy T. Helvering, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 6, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case requires us to determine whether and what interests that came into enjoyment upon the death of the donee of a general power of appointment should be included for federal estate tax purposes in the donee's gross estate. § 302(f) of the Revenue Act of 1926, c. 27, 44 Stat. (part 2) 9, 71, as amended by § 803(b) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279, 26 U. S. C. § 811(f).

The problem arises from the following circumstances. Rogers Sr. gave his son, the decedent, a general testamentary power of appointment over certain property, with limitations in default of the appointment to the heirs, under New York law, of the son. On the son's death these heirs were his widow, a daughter and a son, to each of whom would have come upon default one-third of the property. However, the decedent did exercise his power. His will, as determined by a decree of the Surrogate's Court of the County of New York, New York (New York Law Journal, November 9, 1938, p. 1542, and 170 Misc. 85), created the following interests so far as here relevant: a fraction of the appointable property, 6.667%, went in three equal shares to the widow, the daughter, and a grandson; of the balance, two equal shares were put in trust for the benefit of the widow and daughter, respectively, while the other third was appointed outright to the grandson. The decedent made no appointment to his son.

In determining the value of the gross estate, the Commissioner included the value of all property of which decedent disposed by appointment. He did so by applying the direction of § 302 of the Revenue Act of 1926, whereby

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ." 44 Stat. (part 2) 9, 70-71, as amended by § 803(b) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279, 26 U. S. C. § 811(f).

The Board of Tax Appeals reduced the value of his gross estate by excluding the value of the property which passed to the widow and daughter.[1] It did so on the ground that that which came to these two under the power was less in value than would have come to them under the will of the donor of the power had that power not been exercised by the donee. On review the Circuit Court of Appeals for the Second Circuit reversed the Board and reinstated the deficiency determined by the Commissioner, taxing all the property which the decedent appointed. Two of the judges expressed distinct views, the third concurred in the result without joining either of his brethren. 135 F. 2d 35. Because of the importance of the issue to the administration of federal estate taxation as well as to settle an asserted conflict between the Second Circuit and the Third and Fourth Circuits (*Rothensies v. Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758; *Legg's Estate v. Commissioner*, 114 F. 2d 760, and see *Lewis v. Rothensies*, 138 F. 2d 129), we brought the case here. 320 U. S. 210.

We agree with the decision below. A contrary view would mean that the decedent did nothing so far as he created interests for his widow and daughter, although undeniably the donee, by his will, exercised his power of appointment. Nothing of a taxable nature happened, it is urged, no property "passed" through this exercise of his power because by his will the donee gave interests to appointees who, if he had not exercised the power, would have come into enjoyment of interests in the property

[1] The Board of Tax Appeals had originally taken a different view. Leser *v.* Commissioner, 17 B. T. A. 266, 273. But Helvering *v.* Grinnell, 294 U. S. 153, led it to change its view. Webster *v.* Commissioner, 38 B. T. A. 273, 284-289.

though to be sure other interests than the donee saw fit to give them.

The argument derives from considerations irrelevant to the ascertainment of the incidence of the federal estate tax. In law ~~as elsewhere~~, the right answer usually depends on putting the right question. For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed. That other values, whether worth more or less as to some of the beneficiaries, would have ripened into enjoyment if a testator had not exercised his privilege of transmitting property, does not alter the fact that he and no one else did transmit property which it was his to do with as he willed. And that is precisely what the federal estate tax hits—an exercise of the privilege of directing the course of property after a man's death. Whether, for purposes of local property law testamentary dominion over property is deemed a "special" or a "general" power of appointment, *Morgan* v. *Commissioner*, 309 U. S. 78; whether local tax legislation deems the appointed interest to derive from the will of the donor or that of the donee of the power, *Matter of Duryea*, 277 N. Y. 310; whether for some purposes in matters of local property law title is sometimes traced to the donee of a power and for other purposes to the donor, cf. *Chanler* v. *Kelsey*, 205 U. S. 466, 474, are matters of complete indifference to the federal fisc.

Whether by a testamentary exercise of a general power of appointment property passed under § 302 (f) is a question of federal law, once state law has made clear, as it has here, that the appointment had legal validity and brought into being new interests in property. See *Helvering* v. *Stuart*, 317 U. S. 154. Were it not so, federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation. *Lyeth* v. *Hoey*, 305 U. S. 188, 191-194. In taxing "property passing under a general power of appointment exercised . . . by will", Congress did not deal with recondite niceties of property law nor incorporate a crazy-quilt of local formalisms or historic survivals. The importation of these distinctions and controversies from the law of property into the administra-

tion of the estate tax precludes a fair and workable tax system." *Helvering* v. *Hallock*, 309 U. S. 106, 118. Congress used apt language to tax dispositions which came into being by the exercise of a testamentary privilege availed of by a decedent and which in no other way could have come into being. Such is the present case. To bring about the results which decedent sought to bring about, he had to deal with the whole of the corpus over which he had the power of disposition. To give what he wanted to give and to withhold what he wanted to withhold, Rogers Jr. had to do what he did. And so what is taxed is what Rogers Jr. gave not what Rogers Sr. left. The son's appointees got what they got not because he chose to use one set of words rather than another set of words, but because he willed to give them the property that he willed. If the result of his testamentary disposition is to subject his beneficence to the estate tax, that is always the effect of an estate tax.

Nothing that was decided or said in *Helvering* v. *Grinnell*, 294 U. S. 153, stands in the way of this conclusion. Where a donee of a power merely echoes the limitations over upon default of appointment he may well be deemed not to have exercised his power, and therefore not to have passed any property under such a power. That case is a far cry from this. To suggest that all the property necessary to effectuate the arrangements made by decedent's will did not constitute property passing under his testamentary power would disregard the fact that he had complete dominion over this property and disposed of all of it as his fancy, not at all as his father's will, dictated. Indulgence of that testamentary fancy to the full extent assessed by the Commissioner is what § 302(f) taxes.

Judgment affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Chief Justice STONE and Mr. Justice ROBERTS, dissenting.

We are of opinion that the judgment should be reversed.

This litigation is concerned only with the tax to be paid on the exercise of the testamentary power which purported to give outright to decedent's wife and daughter, each, about 7% of one-third

of the trust fund created under the earlier will and the income for life from the remainder of that third, instead of the outright gift of a full one-third of the trust fund which, in default of appointment, each was entitled to receive under the earlier and then operative will.

The only effect of the exercise of the power upon the shares of the wife and daughter was to diminish the gifts which they were already entitled to receive under the earlier will. The Board of Tax Appeals has found that, as a result of the exercise of the power, the value of the property which the two appointees will receive is less than each was entitled to receive under the first will, which fixed their rights as legatees subject only to exercise of the power.

We think that neither the history nor the words of the taxing statute justify any assumption that in enacting a tax on testamentary gifts it was the purpose of Congress to tax also the exercise of a testamentary power to deprive a legatee of part of his legacy in addition to taxing the use of the power to appoint that part to a third person. The statute lays a tax on gifts such as the earlier will in this case made to the wife and to the daughter and as now interpreted the statute imposes a second tax on the testamentary exercise of the power to diminish the gifts previously made to them by will. Authority for so incongruous a result is found in the provisions of § 302 (f) of the Revenue Act of 1926, which directs the inclusion in the decedent's estate for taxation, of "the value" of property "to the extent of any property passing under a general power of appointment" exercised by a decedent. The statute thus selects property values passing under the exercise of a power of appointment as the measure of the tax. It gives no indication that beyond this it is concerned with the technical quality of estates passing under either the will or the subsequent exercise of the power. And, unlike later amendments to the estate tax statute, Revenue Act of 1942, § 403, 56 Stat. 942; cf. 26 U. S. C. § 811 (d), it taxes not the mere existence of a power to affect the disposition of property, but its exercise to bestow on the appointee such property values.

Looking to the words of the statute in the light of its purpose, we think that the effective operation of the exercise of the power to transfer property values was the intended subject of the tax, and not a use of the power which adds nothing to, but subtracts from, gifts already made and subject to taxation. This Court so

stated in *Helvering* v. *Grinnell*, 294 U. S. 153. We can hardly suppose that a purported exercise of a power to make to the wife and daughter gifts, identical with those to which they were already entitled under the will, or to appoint to a third person an interest less than the whole in the shares given to them by the will, would result in a tax on the shares which the wife and daughter were permitted to retain.

To say that such a tax must be imposed because by a different form of words the same end is attained, is to sacrifice substance to form in the application of a taxing statute which is concerned only with substance, the effective transfer of property values to an appointee. *Helvering* v. *Grinnell*, *supra*; 156; *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. 2d 758; *Legg's Estate* v. *Commissioner*, 114 F. 2d 760. We have too often committed ourselves to the proposition that taxation is a practical matter concerned with substance rather than form, see *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 174; *Chase National Bank* v. *United States*, 278 U. S. 327, 336; *Carliss* v. *Bowers*, 281 U. S. 376, 378; *Griffiths* v. *Commissioner*, 308 U. S. 355, 357-8; *Helvering* v. *Hallock*, 309 U. S. 106, 116-19; *Helvering* v. *Horst*, 311 U. S. 112, 116-19, to depart from it now.